93-815

No. _____

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1993

MARY E. HARRIS,

Petitioner,

vs.

SKI PARK FARMS, INC.,

Respondent.

Petition For Writ Of Certiorari
To The Washington State Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the issuance of an abandonment notice by the Interstate Commerce Commission for a federal land grant railroad right-of-way trigger an instantaneous termination of the easement of the right-of-way on the title of the servient estate, or must the landowner take legal action to quiet title, re-enter, or eject to clear the encumbrance of the right-of-way from the fee of the land?

2. Since the termination of an easement requires an action on the part of the grantee of the easement, must a railroad disclaim, quit claim, or default on its interest in a right-of-way, after the abandonment notice is issued by the Interstate Commerce Commission, for the servient estate to be unemcumbered by the easement of the right-of-way?

3. Does the abandonment of a federal land grant railroad right-of-way easement affect the title to the fee of the servient estate, or does the fee of the servient legal subdivision of land remain unaffected by the act of abandonment?

4. Does 42 Stat. 414, USC Title 43 Sec. 912, "An Act to Provide for the Disposition of Abandoned Portions of Rights of Way Granted to Railroad Companies", require claimants/owners of abandoned railroad lands to take legal action to quiet title, re-enter, or eject in appropriate courts of law, for title to vest free of the encumbrance of the right-of-way?

5. Can the phrase "excepting railroad right-of-way" in a chain of title change meaning from "excepting an easement" before the date of abandonment to "excepting a fee for the grantor" after the date of abandonment, when the grantor has

QUESTIONS PRESENTED – Continued

taken no action to quiet title, eject, re-enter or clear title to the servient estate?

6. Does the phrase:

> "Provided, That this Act shall not affect conveyance made by any railroad company of portions of its right-of-way if such conveyance be among those which have been or may hereafter and before such forfeiture or abandonment be validated and confirmed by an Act of Congress . . . "

(42 Stat. 414, U.S.C. Title 43, Sec. 912, March 8, 1922) require, by implication, that the railroad must be formally notified, and become a party to a quiet title action on its abandoned right-of-way, so that any conveyance, encumbrance or covenant which was established on the right-of-way during the tenure of the railroad, can be legally established, recorded and protected during the quiet title process?

7. Are Section 3, Land Grant Act of 1864 railroad rights-of-way currently construed by federal courts to be "easements" rather than limited fees with implied rights of reverter.

PARTIES TO THE PROCEEDING

The Petitioner is Mary E. Harris, who was the Plaintiff in the Trial Court, the Respondent at the Court of Appeals, and the Petitioner and Appellee at the Washington State Supreme Court.

The Respondent is Ski Park Farms, Inc., a Washington Corporation, which was Defendant in the Trial Court, Appellee at the Court of Appeals, and Respondent at the Washington State Supreme Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 4

Statement of Facts 4

a. Nature of Dispute 4

b. Procedural Background 7

REASONS FOR GRANTING THE WRIT 12

1. Evolutionary Concept of Railroad Right-of-Way Easement 12

2. Burlington Northern Abandonment 14

3. Ski Park is Not Successor in Title to Legal Subdivision 16

4. No Ambiguity in Deed 16

5. Interstate Commerce Commission – Abandonment 17

6. Encumbrances to be by Deed 18

7. Doctrine of Merger Does Not Apply 18

8. Extrinsic and Parol Evidence Demonstrates Harris' Intent 19

TABLE OF CONTENTS – Continued

Page

9. State Supreme Court Calls "Easement" Confusing 20
10. Declaration of Becker: Author of Deed 20
11. Indefeasible Title 21
12. Termination of Easement: Necessity of re-entry by grantor 21
13. Language of Exception Can Have Only One Meaning 22
14. Floating Easement 23
15. Insufficient Language of Reservation 23
16. Court Opinion on Effect of Abandonment on the Fee of the Servient Estate 23
17. Title Remains in Holder of Servient Estate 24
18. Lower Courts Misconstrue Prior Decisions 25
19. Summary 27

CONCLUSION 27

APPENDIX A-1

Washington State Supreme Court Decision, February 11, 1993 ..... A-1

Order Denying Motion for Reconsideration, State Supreme Court, June 8, 1993 ..... B-1

Mandate, Washington State Supreme Court, June 10, 1993 ..... C-1

Opinion, Washington State Court of Appeals, February 25, 1991 ..... D-1

Amended Opinion, Washington State Court of Appeals, August 15, 1991 ..... E-1

TABLE OF CONTENTS – Continued

Page

Findings of Fact and Conclusions of Law, Pierce County Trial Court, Sept. 7, 1988.....F-1

Default Judgment – Quiet Title Action #87 2 01090 8, December 31, 1987.....G-1

Encumbrances to Harris' Warranty Deed, Policy A-49090, October 29, 1987..... H-1

Map of Tax Parcel # 05-19-27-1-003, Area between two highways.....H-4

Legal Notice and Publication – Intent to Quiet Title Abandoned Burlington Northern Railroad Right-of-way, Mary E. Harris et al v. unknown persons, Sept. 3, 1987..... H-5

Disclaimer of Interest Burlington Northern Railroad, December 28, 1987.....H-7

Certified Declaration of Mary E. Harris, July 5, 1988..... H-9

Affidavit of Donald A. Kellman, Attorney, February 25, 1993..... H-13

Declaration of John Becker, Author of Deed, June 21, 1988..... H-15

Clark McGowan, Broker, letter to Harris, July 31, 1987..... H-17

Clark McGowan, Broker, letter to Harris, August 25, 1987..... H-18

Asset Recovery Bill of Sale for ten bridges, January 26, 1988..... H-19

Harris letter to Interstate Commerce Commission, March 17, 1986.....I-1

TABLE OF CONTENTS – Continued

Page

Interstate Commerce Commission letter to Harris, March 26, 1986. . . . . I-2

Harris letter to Burlington Northern Railroad, April 17, 1986. . . . . I-3

Burlington Northern letter to Harris, July 14, 1986. . . I-4

Harris letter to Burlington Northern Railroad, July 28, 1986. . . . . I-5

Harris letter to Pierce County Assessor, January 15, 1987. . . . . I-7

Pierce County Assessor's letter to Harris, January 21, 1987. . . . . I-9

Pierce County Prosecuting Attorney's letter to Harris, January 23, 1987. . . . . I-10

TABLE OF AUTHORITIES

Page

CASES

Barker v. Lashbrook, 128 Kan. 595, 279 P.12 (1929) 23

Biles v. Tacoma O. & G.H.R.R., 5 Wash. 509, 32 P.211 (1893) 25

Brown v. Weare, 152 S.W.2d 649 (1941) 16, 24, 25

City of Aberdeen v. Chicago and North Western Transportation Co., 602 F. Supp. 589 (1984) 29

Energy Transportation Systems, Inc. v. Union Pacific Railroad Co., 606 F.2d 934 (1979) 13, 16

Federal Farm Mortgage Corp. v. Smith, 149 Kan. 789, 89 P.2d 838 (1939) 23, 24, 25

Harris v. Ski Park Farms, Inc., 120 W.2d 727, 844 P.2d 1009 (2/11/93) 26

Hilt v. Weber, 252 Mich. 198, 233 N.W. 159, 71 A.L.R. 1238 (1930) 27

Jones v. Southern R. Co., CCA 5th, 285 F.19 (1922) 22

Lawson v. State of Washington, 107 W.2d 444, 730 P.2d 1308 (1986) 13

Russell v. Martin, 88 So.2d 315 (1956) 26

State of Idaho v. Oregon Short Line R. Co., 617 F.Supp. 213 (D.C.Idaho 1985) 29

Studebaker v. Beek, 83 Wash. 260, 145 P.225 (1915) 25, 26

Swan v. O'Leary, 37 Wn.2d 533, 225 P.2d 199 (1949) 26

United States v. Union Pacific R. Co., 353 U.S. 112, 1 L.Ed.2d 693, 77 S.Ct. 685 (1957) 12

Veach v. Culp, 92 Wn.2d 570, 579 P.2d 526 (1979) 26

TABLE OF AUTHORITIES – Continued

Page

STATUTES/REGULATIONS/CONSTITUTIONAL PROVISIONS

12 Stat. 489 § 3 (July 1, 1862) 13

13 Stat. 358 (July 2, 1864) 2, 13, 14, 25

42 Stat. 414, U.S.C., Title 43, Sec. 912 ..... *passim*

49 U.S.C. 10903, 92 Stat. 1404 ..... 2, 3, 8

49 U.S.C. 10906, P.L. 95-473 (1978), 92 Stat. 1406 2

General Railway Right of Way Act §§ 1-6, 43 U.S.C., 1976 ed. §§ 934-939 (1875) 13

Thirteenth Amendment to the United States Constitution, Section 1 28

Revised Code of Washington State

RCW. 64.04.010 ..... 18, 28

RCW 64.04.030 21

MISCELLANEOUS

136 ALR 316 #3 21

19 Am Jur 489 Estates § 29 21

"Washington State Bar News," May 1993, Page 22 "Notes from the Academy" W.B. Stoebuck, Real Property (Case 1) 26

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In The

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MARY E. HARRIS,

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Petition For Writ Of Certiorari
To The Washington State Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner, Mary E. Harris,

Petition for a Writ of Certiorari to review the decision of the Washington State Supreme Court, filed on June 8, 1993.

OPINIONS BELOW

The Opinion of the Supreme Court of the State of Washington filed on February 11, 1993 is included at Appendix "A". The Order denying Motion for Reconsideration by the Supreme Court of the State of Washington is included at Appendix "B" and is dated June 8, 1993. The Mandate of the Supreme Court of Washington, dated June 10, 1993 is included at Appendix "C". The Opinion of the Court of Appeals of the State of Washington, Division Two, dated February 25, 1991 is included at Appendix "D". The Amended Opinion of the State Court of Appeals, dated August 15, 1991 is included at Appendix "E". The Findings of

Fact and Conclusions of Law of the Superior Court of the State of Washington in and for the County of Pierce dated September 7, 1988 is included at Appendix "F". The Default Judgment No. 87-2-01090-8 of the Superior Court of the State of Washington in and for the County of Pierce, dated December 31, 1987, is included at Appendix "G".

JURISDICTION

The Order Denying Motion for Reconsideration by the Supreme Court of Washington was filed on June 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a).

The Petitioner has property rights which vest pursuant to 42 Stat. 414, U.S.C. Title 43, Sec. 912 and 13 Stat. 358. The Supreme Court of the United States is the next level of appeal to adjudicate and interpret the federal statutes involved in this case. Other relevant statutes are 49 U.S.C. 10903, P. L. 95-473, the issuance of a Certificate of Railroad Abandonment, and 13 Stat. 358, July 2, 1864, The Pacific Grant of Lands to Railroads.

The Petitioner has 90 days from June 8, 1993 to request Petition for Writ of Certiorari to the Supreme Court of the State of Washington.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The federal "Act to provide for the disposition of abandoned portions of rights-of-way granted to railroad companies" provides:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever public lands of the United States have been or may be granted to any railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then

and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: Provided, That this Act shall not affect conveyances made by any railroad company of portions of its right-of-way if such conveyance by among those which have been or may hereafter and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this Act affect any public highway now on said right-of-way: Provided further, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same."

Approved, March 8, 1922 (42 Stat. 414, U.S.C., Title 43, Sec. 912)

The Interstate Commerce Commission has the authority under 49 U.S.C. 10903, P.L. 95-473, to issue certificates of abandonment for portions of railroad rights-of-way:

"(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. . . . "

(C) Except as provided in sections 10905 and 10906 of this title –

(1) if a certificate is issued without an investigation under section 10904 (c) of this title, the abandonment or discontinuance may take effect under the certificate on the 30th day after the issuance of the certificate; or

(2) if a certificate is issued after an investigation under Section 10904 (c) of this title, the abandonment or discontinuance may take effect under the certificate on the 120th day after the issuance of the certificate.

How do these federal statutes operate to affect the title of the servient estate? When does title vest free of the encumbrance of the right-of-way?

STATEMENT OF THE CASE

1. Statement of Facts:

a. Nature of the Dispute:

The nature of the dispute is a quiet title action on an abandoned railroad right-of-way of a federal land grant railroad. Petitioner Harris is claiming reversionary interests as the owner of a legal subdivision of land over which the railroad right-of-way existed. These interests vest pursuant to 42 Stat. 414, U.S.C., Title 43, Sec. 912, the Disposition of Abandoned Portions of Railroad Rights of Way.

On October 29, 1987, Opal Winkelman conveyed to Mary Harris, the Petitioner, the disputed property which consists of a parcel between 140 and 200 feet wide and approximately 1400 feet long, which is situated between two highways in Pierce County, Washington State. The parcel also contains a 193 foot long railroad trestle and a ten inch spring which runs under the trestle. It is valuable to Harris because it serves as access to her adjoining land and is continuous with it. Two parcels were conveyed by the warranty deed: one in Section 27 and one in Section 26. Both properties were bisected by the right-of-way of the Burlington Northern Railroad, as successor in interest to the Northern Pacific Railroad. The notice

of abandonment was issued for this right-of-way by the Interstate Commerce Commission of February 15, 1985, but Winkelman took no action to re-enter, or quiet title the land burdened by the right-of-way.

Winkelman acquired her interest in the disputed property by warranty deed in 1946 from Sabin. The Sabin deed said:

> "*except the right-of-way of the Northern Pacific Railway Company.*" (emphasis supplied)

In July, 1987 Harris entered into a Purchase and Sale Agreement with Winkelman to buy the following:

> "All of that portion of tax parcel number 05-19-27-1-003 lying between State Route 162 (Pioneer Way) and the South Prairie-Carbon River Road *excepting the Northern Pacific Railroad right-of-way easement.* (emphasis supplied)
>
> "All of that portion of tax parcel 5-19-26-2-007 lying between South Prairie Creek and the South Prairie-Carbon River Road *excepting the Northern Pacific Railroad right-of-way easement.*"

Winkelman was exclusively represented by real estate broker Clark McGowan who ordered a title report. *App. H-17. The title report disclosed two relevant exceptions – lis pendens to quiet title on the abandoned Burlington Northern Railroad Right-of-Way and the other was a continuing interest of the railroad in the property. See App. H-1-3.*

On October 29, 1987, Winkelman delivered a Statutory Warranty Deed to Harris. Harris paid $7,000.00 for the property:

> Parcel A: That portion of the west half of the northwest quarter of Section 26, Township 19 North, Range 5 East of the W.M., Pierce County, Washington, lying southeasterly of South Prairie Creek and northwesterly of South Prairie-Carbon River County Road, *excepting therefrom right-of-way of the Burlington Northern (formerly Northern Pacific) Railway Company.* (emphasis supplied)
>
> Parcel B: That portion of the southeast quarter of the northeast quarter of Section 27, Township 19 North, Range 5 East of the W.M., Pierce County,

> Washington, which lies southeasterly of the southeasterly margin of State Route 162 (Pioneer Way) and northwesterly of South Prairie-Carbon River County Road, *excepting therefrom right-of-way of the Burlington Northern (formerly Northern Pacific) Railway Company.* Situate in Pierce County, Washington. (emphasis supplied)

Surveyor John Becker, Winkelman's agent, prepared the legal description for the warranty deed. *App. H-15-16.* He was not instructed to except a free interest in the right-of-way for the grantor. Had he been so instructed, he would have used other language. *App. H-15-16.*

The status of Burlington Northern's interest in the right-of-way was unclear at the time of the sale of the land to Harris. Since Harris owned an adjoining land parcel for several years, located between Parcel A and Parcel B, that was also bisected by the abandoned railroad right-of-way, she attempted to determine the significance of the abandonment on her land. She started a paper trail of letters to and from the Interstate Commerce Commission, Burlington Northern, County Assessor, County Prosecuting Attorney and other attorneys. *See App. I-1-11.*

Harris discussed the railroad's interest in the land purchase with McGowan before and after the closing of the sale.

On February 24, 1988, Ski Park Farms, Inc. paid Winkelman $250.00 for a quitclaim deed purporting to convey Winkelman's interest in the disputed property and in other property, formerly subject to the abandoned railroad right-of-way.

This quitclaim deed stated:

> "That portion of the Burlington Northern Railroad Company's (formerly Northern Pacific Railway Company) McMillan to Buckley, Washington Branch Line right-of-way, now abandoned, located upon, over and across section 27, Township 19 North Range 5 East, W.M. described as follows:
>
> All that portion of said Railroad Company's 400 foot wide Branch Line right-of-way being 200 feet on each side of said Main Track centerline in

> the North half of the Southeast quarter of said Section 27, lying Northerly of the West production of the South line of Lot 6 of Survey No. 8701200255, recorded January 2, 1987, and South of the North Line of said North half of the Southeast quarter of said Section 27.
>
> Also all that portion of said Railroad Company's 200 foot wide Branch Line right-of-way being 100 feet on each side of said Main tract centerline in the Southeast quarter of the Northeast quarter of said Section 27, lying North of the South line of said Southeast quarter of the Northeast quarter of said Section 27."

The quitclaim deed of February 24, 1988, is the sole basis upon which Ski Park asserts title to the property. The disputed area covers about one-third of the area covered by the quitclaim deed. So, Ski Park paid $83.00 for the disputed land.

B. Procedural Background:

1. By an Act of Congress on July 2, 1864, the Northern Pacific Railroad was empowered to construct a railroad right-of-way for the purpose of connecting Lake Superior and Puget Sound on the Pacific Coast:

> "An act granting lands to aid in the construction of a railroad and telegraph lines from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route, approved by the President of the United States."

Under Section 3 of this act the railroad was given odd sections of land along the route, to sell, to aid the construction process. Section 05-19-27, east of the Willamette Meridian, Pierce County, Washington, was such a section. The Act of 1864 granted 40,000,000 acres to the railroads.

2. On April 26, 1876, the Northern Pacific Railroad sold 386 acres of this section to Samuel Wilkeson, Jr. The deed of the NPRR to Wilkeson specified, however:

> ". . . *Reserving and excepting, however, from the above described premises, a strip of land, two hundred feet wide, extending through the same on the line of the road of the said Northern Pacific Railroad Company,* or on the line of any of its branches to be and for a right-of-way, or for other railroad purposes in case the line of said railroad or any of its branches, has been or shall be, located on or over, said described pieces or parcels of land and premises, being part of the same land granted to the party of the first part by the United States of America under and by virtue of the said act of Congress, approved the second day of July 1864. . . . " (emphasis supplied)

3. On March 8, 1922, Congress passed "An Act to Provide for the Disposition of Abandoned Portions of Rights of Way Granted to Railroad Companies." (see Jurisdiction, page *3*). This statute, 42 Stat. 414, U.S.C., Title 43, Sec. 912 is a federal mandate for the orderly assimilation of abandoned portions of rights-of-way back into the countryside and servient estates from which they came. (In 1985 through 1988 about 12,000 miles of right-of-way were abandoned, most being easements.)

4. On February 15, 1985, the Interstate Commerce Commission issued a certificate of abandonment under 49 U.S.C. 10903 to Burlington Northern Railroad, the successor to the Northern Pacific Railroad, allowing abandonment of its right-of-way in 05-19-27 E.Wm., Pierce County, Washington. This was a 26 mile abandonment that involved about 464 parcels of land and 273 landowners of servient estates.

5. In the following two years, Burlington Northern proceeded to remove its rails, ties and culverts, but it did not remove its trestles, nor disclaim its interest in the right-of-way. Burlington Northern continued to pay property taxes on the entire right-of-way, after the issuance of the ICC abandonment. The railroad left a 193 foot long trestle on the property in dispute, and nine other bridges.

6. On February 27, 1987, Harris and others filed a complaint to quiet title property subject to former railroad right-of-way. This was *Mary E. Harris et al. v. Burlington*

Northern Railroad et al. 87-2-011090-8. Two lis pendens to quiet title were filed with the county auditor, the original, and an amended one.

7. On July 24, 1987, Harris and Winkelman signed a Purchase and Sale agreement for two parcels of land.

8. On October 29, 1987, Winkelman issued a warranty deed to Harris.

9. On December 28, 1987, Burlington Northern disclaimed/quitclaimed its *App. H-7-8* interest in the right-of-way to the 40 specific plaintiffs in default action.

10. On December 31, 1987, the 40 plaintiffs, including Harris, obtained a Default Judgment #87-2-01090-8 from the Honorable E. Albert Morrison. *See App. G-1-4.*

11. On January 26, 1988, Asset Recovery Inc., an agent and contractor for Burlington Northern Railroad wrote a bill of sale for $1.00 to Pierce County for the ten railroad trestles. The 193 foot trestle on the disputed land was purportedly being sold for 10¢ (1/10 of $1.00). *See App. H-19.*

12. About February 11, 1988, Harris and her contractors began salvage operations on the trestle on her land. On or about February 12, 1988, a Pierce County Sheriff drove on the property and arrested Harris, and her contractors for failing to heed a warning notice to cease and desist the operation which had been given the previous day. Harris showed the sheriff a copy of the default judgment proving her ownership of the land, referred him to her attorney, and told him that she would sue him for false arrest. He rescinded the arrest order, apologized, told them to proceed, and left.

13. On February 24, 1988, Ski Park obtained a quitclaim deed for the disputed property and other land as well.

14. On February 26, 1988, the landowners of the quiet title group, including Harris, and their attorney were called into Judge Morrison's court again. Pierce County Deputy Prosecuting Attorney Roger Miener appeared in court waving the quitclaim deed of Ski Park and the $1.00 bill of sale to the county. His intent was to show confusion about the ownership of the trestles in order to get a restraining order preventing further bridge demolitions. One landowner cut his bridge

down with a chain saw. Judge Morrison issued the restraining order. The quitclaim deed was not filed with the county auditor until March 1, 1988.

15. In March 1988, Ski Park moved to vacate the default judgment against unknown parties claiming that it was never named, nor served. *See App. H-5-6.* Judge Morrison vacated the default judgment and agreed to review the Harris quiet title action with respect to the disputed property. Case 87-2-01090-8 became bifurcated. Ski Park brought a motion for Summary Judgment to quiet title the property described in the quitclaim deed. Harris filed a cross-motion for Summary Judgment to quiet title that property as conveyed to her by the Winkelman warranty deed.

16. On March 12, 1988, Plaintiff Owen Dickson of the group quiet title action died in a fall from the old railroad trestle that was left on his property.

17. On March 25, 1988, the landowners and their attorney were called back to court. Deputy Prosecuting Attorney Roger Miener, representing the county, disclaimed all interest in the old railroad trestles, admitted that the $1.00 bill of sale, *App. H-19*, based on a defaulted demolition contract was worthless, admitted that the trestles had become part of the realty of the land, and that whoever owned the land also owned the bridges. The county agreed to board up the trestles and post NO TRESPASSING signs on them.

18. On July 5, 1988, Judge Morrison denied both motions for Summary Judgment and ruled that the dispute between Harris and Ski Park presented factual questions inappropriate for a resolution as summary judgment. Ski Park filed a motion for reconsideration of the court's ruling. Harris filed a similar one. The court heard these motions on July 22, 1988. Both parties stipulated that there were no issues of material fact. The court heard again the motion for Summary Judgment and quieted title in the disputed property to Harris. Ski Park filed a further motion for reconsideration on August 17, 1988. This motion was denied. On September 7, 1988, the court entered written Findings of Fact and Conclusions in support of a judgment quieting title to the disputed property in Harris. *App. F-1-7.*

19. Ski Park appealed to the Court of Appeals on October 5, 1988. Ski Park sought a reversal of the trial court's decision. On February 25, 1991, the Appeals Court filed a Memorandum Decision reversing and remanding the trial court with instructions "to enter summary judgment quieting title to the property within the right-of-way adjacent and adjoined to the Ski Park property in Ski Park Farms, Inc." However, no Ski Park land abuts the disputed parcel which is bordered by two highways. *See App. H-4 map.*

On reconsideration, the Court of Appeals issued a new opinion and remanded to the trial court to quiet title to the disputed parcel in Ski Park on August 15, 1991. The Court of Appeals' decision considered the right-of-way in the Sam Wilkeson chain of title to be limited fee with implied condition of reverter." The State Court of Appeals stated that the phrase "excepting right-of-way of Burlington Northern Railroad" was superfluous, that, therefore, the language must have some other meaning, that is, "to except the fee interest in the right-of-way land for the grantor Winkelman, since the fee had passed to Winkelman free of the encumbrance of the right-of-way on February 15, 1985."

20. Harris appealed to the State Supreme Court of Washington. Although the State Supreme Court acknowledged that most railroad rights-of-way are easements, and made no mention of the limited fee with implied right of reverter, the court treated the conveyance as though the right-of-way were a determinable fee rather than an easement which requires action in court by the owner of the servient estate to terminate. *See App. A-1-25.*

21. A Motion was made by Harris for Reconsideration of the State Supreme Court decision. Harris filed another brief alluding to the confusion of the irrelevant sale of Lot # 6 to Ski Park with the Winkelman – Harris sale. A certified copy of Harris' signed Declaration was also sent. *See App. H-9-12.* The Clerk of the Pierce County Court failed to send the correct document to the State Supreme Court – Harris' signed Declaration of July 7, 1991. On June 8, 1993, the Motion for Reconsideration was denied. The Court issued a

Mandate for the disputed property to be quieted in the name of Ski Park on June 11, 1993.

22. Petitioner Harris now appeals to the Supreme Court of the United States as the next level of appeal, since there are federal issues and statutes involved in this dispute and Harris is claiming property rights which vest pursuant to 42 Stat. 414, U.S.C., Title 43, Sec. 912. Petitioner Harris appeals to this Court to reverse the Opinion of the State Supreme Court of the State of Washington, affirm the Findings of Fact and Conclusion of Law issued by the trial court on September 7, 1988 by the Honorable E. Albert Morrison, and quiet title the disputed land in Mary E. Harris.

REASONS FOR GRANTING THE WRIT

1. Evolutionary Concept: Railroad Right of Way Easement

Petitioner, Mary Harris, is the successor-in-title to Sam Wilkeson, Jr. who received a deed subject to the railroad right-of-way of the Northern Pacific Railroad in 1876. When Wilkeson bought the land there was a "floating" easement of the right-of-way on the title of the land, because the right-of-way was not established until about ten years later.

The Pacific Railroad Land Grant of 1864 was the vehicle through which the railroad came into ownership of Section 27, the land in which tax parcel # 05-19-27-1-003 is located. *See App. H-4*. For the first several decades, the old Section 3, railroad land grants were viewed by both the federal courts and Congress to be rights-of-way of limited fee with implied rights of reverter. This reverter referred to the United States government.

Later with the subsequent court decisions expanding the concept of easement, the limited fee concept became obsolete. In 1957, the Supreme Court in *United States v. Union Pacific Railroad*, 353 U.S. 112, 77 S.Ct. 685, 1 L.Ed. 2d 693 (1957), modified the "limited fee" concept by stating: "The most that the limited fee cases decided was that the railroad received all

surface rights to the right-of-way incident to use for railroad purposes." *Id.* at 119 S.Ct. at 689.

In 1922 Congress passed a law designed to dispose of abandoned portions of railroad rights-of-way in an orderly fashion, 42 Stat. 414, U.S.C. Title 43, Sec. 912. This statute provided that federally granted railroad rights-of-way would vest in the owner of the legal subdivision of the servient estate upon abandonment. This law applied to the 1862, 1864, 1871 and 1875 right-of-way grants. It is applicable to the odd section land grants out of which parcel 05-19-27-1-003 was carved. *See App. H-4 map.*

The federal courts continued to contemplate the nature of railroad rights-of-way, and ultimately, in the 1979 decision of the 10th U.S. Circuit Court of Appeals, *Energy Transportation Systems, Inc. v. Union Pacific Railroad,* 606 F.2d 934 (1979), it was held that the railroad's predecessor in interest (the original railroad) as grantee of odd-numbered sections of land along its railroad line under Section 3 of the Pacific Railroad Act of 1862, acquired the servient estate also; that the railroad subsequently conveyed that servient estate to other grantees; and that therefore, the subsequent grantees had the power to effectively convey easements to ETSI, for its underground coal and slurry pipeline beneath the railroad's right-of-way. *Id.* at 938. This opinion is applicable, therefore, to Sam Wilkeson's interest as being a fee interest in the servient estate burdened by the easement of the railroad right-of-way. Both the Act of 1862 and 1864 are identically worded and have equal intent, hence the above decision is applicable to the 1864 land grant, Section 3, lands.

The timely Washington State Supreme Court decision of *Lawson v. State of Washington,* 107 W.2d 444, 730 P.2d 1308 (1986) made it clear that most railroad rights-of-way in Washington State are construed to be easements, within the broadened definition of the term. Harris original land parcel excepted "the right-of-way of the Northern Pacific Railroad *easement.*"

2. Burlington Northern Abandonment

Harris organized a group of landowners along the right-of-way, formed a corporation, and began a group quiet title action. Attorneys advised that a quiet title action would be necessary to clear title to the old right-of-way. The attorneys did exhaustive title and map searches throughout 1987.

Harris' original parcel was also bisected by the old right-of-way. She was interested when she read about the abandonment. Previous to the date of abandonment, and after, Harris had written to and telephoned Burlington Northern, about leasing the right-of-way, or about buying it and putting the pieces back together again. Harris began a paper trail *See App. I-1-11* of letters, to and from the ICC, Burlington Northern, the Assessor, the Prosecuting Attorney, and various other attorneys. *See App. I-4-5*, a letter dated July 14, 1986, from R.C. Flaherty, General Manager Real Estate, BN, Ft. Worth, Texas referring to an offer to "sell" and a "minimum fee for a deed and mortgage release" of $2,000.00. This letter is evidence of Burlington Northern's belief in its ownership and continuing interest in the right-of-way one and one half years after "abandonment".

The County Prosecuting Attorney advised that the Assessor would not perform segregations nor establish boundary lines because Burlington Northern had not yet disclaimed its interest in the right-of-way and the acquisition varied considerably along the 26 mile abandonment. *See App. I-10-11.*

Harris purchased two parcels of land from Winkelman that were traversed by the Act of 1864 abandoned railroad right-of-way. Winkelman conveyed her fee interest in the legal subdivisions of land to Harris, still burdened by the easement of the right-of-way which Winkelman had not quieted. The parcels were about 80% burdened by the easement of the railroad right-of-way.

Harris amended her previously recorded lis pendens and added a new lis pendens through her attorney, to include the newly purchased land in the quiet title action. *See App. H-1-3 # 4.* The quiet title action was legally advertised on September 3, 1987 as prescribed. *See App. H-5-6.*

Puget Power answered, as a respondent, and claimed interest in a powerline right-of-way which Burlington Northern had given it several decades earlier. *See Question 6, page 11.* This covenant was agreed to and provided for within the new legal descriptions. Finally, on December 28, 1987, Burlington Northern disclaimed or quitclaimed its interest in the right-of-way. In Harris' case BN disclaimed its interest to her. *See App. H-7-8.* On December 31, 1987, a Default Judgment was entered. *See App. G-1-4.*

On February 26, 1988, Harris and her attorney first became aware of the quitclaim deed from Winkelman to Ski Park. A six year legal battle ensued. Since the Default Judgment was without flaw that decision with respect to Harris' land should not have been vacated.

Respondent Ski Park, by virtue of the quitclaim deed from Winkelman was legally able to quiet title portions of the right-of-way outside the scope of the Harris legal subdivisions, but after the Harris quiet title action on 05-19-27-1-003, Winkelman held no more interest in that subdivision of land. It should be noted that the quit claim deed from Winkelman also covered the abandoned right-of-way land claimed and/or quiet-titled by two other plaintiffs in the Harris quiet title suit.

The lower court reasoned that Winkelman showed evidence of with-holding a fee interest in the right-of-way by later quit-claiming it to Ski Park. What did her quit claiming the interests of the other two land owners to Ski Park serve to indicate – when she had no interest to convey to them? Hence, if the Harris quiet title action was proper the only thing that Winkelman was quit claiming to Ski Park was the remainder after the Harris land and the land of the other two persons were extracted from it. A quit claim deed is no guarantee of interest.

Ski Park paid a nominal amount for the quit claim deed to the disputed land, about $83.00. Harris paid $7,000.00 for land which was about 80% encumbered by a railroad easement, the title to which had to be quieted to vest free of the encumbrance.

3. Ski Park is Not Successor in Title to Legal Subdivision

In Superior Court and in the Court of Appeals, Ski Park attempted to claim ownership of the disputed parcel by being an adjacent land owner. But no part of Lot # 6, a surveyed and recorded subdivision lot of 60 acres lies adjacent to the disputed land. A sixty foot wide highway separates Lot # 6 from the disputed land. Furthermore, in *Brown v. Weare*, 152 S.W.2d 649 (1941), it was held that a legal subdivision, bounded and enclosed by definitive survey lines through which no right-of-way passes, cannot claim right-of-way outside its definitive boundary. Hence, no right-of-way was conveyed by Winkelman to Ski Park by the sale of Lot # 6. The Court of Appeals and the State Supreme Court opinions were, erroneous when they relied on the sale of Lot # 6 as evidence of anything. The sale price of Lot # 6 is also irrelevant, and was introduced in an effort to confuse the situation.

4. No Ambiguity in Deed

There is no ambiguity in the language of the warranty deed. The language was proper and necessary for conveyance of the two legal subdivisions burdened by the easement of the right-of-way which had not yet been terminated for title purposes. It must also be reiterated that Burlington Northern had not yet disclaimed its interest in the right-of-way, and the quiet title action was not finished until December 31, 1987, about two months *after* the Harris purchase. The railroad right-of-way remained an easement on the servient estate both before the date of the ICC abandonment and after that date, until Harris terminated it in December of 1987. The granting clauses of both the Purchase and Sale Agreement and the warranty deed synchronize with each other on defining the boundaries of the legal subdivisions of land. Although the Harris purchase and sale agreement contains the language "excepting the Northern Pacific Railroad right-of-way easement" that phrase equates with the current federal judicial concept of such a right-of-way. That is, *Energy Transportation Systems, Inc. v. Union Pacific Railroad*, supra opinion,

clearly perceived this type of right-of-way to be an easement. The language of the warranty deed, although more technical, is parallel in scope and in intent. The exception of the right-of-way in the warranty deed is also consistent with the historical language, and the federal judicial interpretation is that this language creates an easement for a railroad.

An easement of a railroad right-of-way is a burden on the servient estate. The easement cannot be erased unilaterally by the owner of the servient estate (even after ICC abandonment notice) because the termination of an easement requires a quiet title or similar action. The act of abandonment does not affect the ownership of the fee of the servient estate, but the estate is passed on encumbered from one successor to another. Only the grantee of an easement can terminate the burden on the servient estate, either by issuing a recorded disclaimer of interest, a quit claim deed, or participating in some manner as defendant or respondent in a quiet title action.

5. Interstate Commerce Commission – Abandonment

Although the ICC issued a certificate of abandonment on February 15, 1985, this act, alone, did not terminate the easement of the right-of-way for title purposes. For that reason, the County Prosecuting Attorney refused to issue segregation orders to the assessor's office, and for that reason the forty plaintiffs had to go through the long and costly process of quiet titling.

Winkelman declared that she was not aware of the abandonment of the right-of-way. It is difficult to believe that an owner whose land is bisected by a railroad, would not notice that no trains ran there anymore, that the ties were rotting and that there were saplings growing up between the tracks. This, at least, indicates a physical abandonment, through disuse. Furthermore, Winkelman's Broker, McGowan, had constructive knowledge of the abandonment, because it was he who ordered, reviewed and approved the title report with the two recorded lis pendens to quiet title to portions of the abandoned Burlington Northern Railroad right-of-way. *See App. H-1-3*. Therefore, he is charged with having knowledge of

both the abandonment and the intent to quiet title. As he was Winkelman's exclusive representative, she is charged, also, with having knowledge of both of these facts. No objection was ever voice by McGowan or Winkelman to the lis pendens on the title policy. Therefore, the grantor consented to the lis pendens as a condition of sale. The lis pendens encumbrance became binding upon the grantor and the grantee.

6. Encumbrances to be by Deed

The Revised Code of Washington State provides that conveyances and encumbrances are to be by deed: "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate shall be by deed. . . . are hereby declared to be legal and valid". RCW 64.04.010. The Purchase and Sale Agreement specified under encumbrances: "Those acceptable to purchaser". The lis pendens to quiet title to the abandoned railroad right-of-way was legally assembled in the land purchase as an encumbrance and became binding by state statute.

7. Doctrine of Merger Does Not Apply

Ski Park attempted to convince the Court of Appeals and the State Supreme Court that Harris somehow modified her intent by accepting a warranty deed without the word easement. This is an illogical assumption. An objective analysis of the language of both instruments, in light of today's federal judicial interpretation of "right-of-way" will conclude that both mean the same thing: a continued reservation of interest in the right-of-way for railroad purposes, a reservation of easement, belonging to the Burlington Northern Railroad. This theory of merger is also dispelled by the fact that Harris' intent remained consistent as proved by all of her actions from 1986 through 1987: Harris intended to obtain the encumbered fee and quiet title it.

8. Extrinsic and Parol Evidence Demonstrates Harris' Intent

Harris seeks reversal of the lower court's decision and affirmation of the trial court's decision quieting title in the disputed property to her. Her intent to purchase the fee, subject to the railroad right-of-way easement is demonstrated by:

1. Harris states her intention in her certified declaration. *See App. H-9-12.*
2. Harris' Purchase and Sale Agreement states her intent by using the word "easement".
3. The title report, ordered by Winkelman, grantor, put Winkelman on notice of Harris' lis pendens and intent to quiet title the abandoned right-of-way. The grantor did not object, which demonstrates the grantor's intent. *App. H-1-3, # 8 and # 9.*
4. The grantor's agent, Becker, prepared the deed. He was not instructed to reserve a fee for the grantor. If he had been instructed to do so he would have used other language. *App. H-15-16.*
5. Under the Purchase and Sale Agreement, Winkelman was obliged to issue a warranty deed (not a quit claim deed), subject only to an easement, demonstrating grantor, Winkelman's, intent.
6. The Purchase and Sale Agreement specified under # 2 Encumbrances: Condition of Title: Title is to free of all encumbrances and defects except: "Those acceptable to purchaser." The lis pendens to quiet title, encumbrance, therefore, became doubly binding between grantor and grantee.
7. At the time of the transaction, the encumbrance of the railroad right-of-way had not been terminated, therefore, the warranty deed from Winkelman, had to conform to the historical language of exception of the railroad right-of-way. Legally and historically, this right-of-way was an easement, not a fee.
8. The parallel of language between the deeds of Sabin to Winkelman to Harris, serves to indicate that they have a parallel meaning and intent.

9. State Supreme Court Calls "Easement" Confusing

The lower court's decision, *App. A-19*, states:

> "Then, in considering Ski Park's evidence, the court said: 'The real estate contract between Winkelman and Ski Park dated April 23, 1987, which antedates the October 29, 1987, Statutory Warranty Deed to Petitioner Harris, at least provides some support to a conclusion that Winkelman intended to reserve a fee interest in the railroad right-of-way, not withstanding the confusion created by the language in the Purchase and Sale Agreement prepared by Petitioner Harris.' "

Since the April and October sales are totally unrelated, it is impossible to discern what "confusion" is created by Harris in her clear use of the term "railroad right-of-way easement", which is a right distinct from ownership.

The April 1987 purchase of Lot # 6 by Ski Park contained no land burdened by railroad right-of-way easement. Therefore, the lower court's reasoning is not logical.

10. Declaration of Becker: Author of Deed

The Court should weigh the testimony of Winkelman's agent Becker, who prepared the language of the Harris Warranty Deed. *See App. H-15-16.* He declared that Winkelman did NOT instruct him to reserve the fee for the railroad right-of-way in preparing the language to convey the property to Harris. His declaration constitutes evidence of the intent of his principal, Winkelman, to convey Winkelman's interest in the disputed parcel subject only to an easement, yet the lower court concludes: "This assertion, of course, is speculative, and cannot itself be used to establish the intent of Winkelman." *See App. A-18.*

Nothing about the Becker Declaration is speculative. It is affirmative and factual in its representations of facts, and thus, evidence. It is solid evidence of Winkelman's intent, or rather lack of intent to reserve the fee of the right-of-way for herself.

11. Indefeasible Title

Under RCW 64.04.030. Warranty Deeds Within the State of Washington, one must have indefeasible title to convey by warranty deed. The title to the right-of-way was clouded at the time of the Winkelman sale to Harris. Neither grantor, nor grantee, nor the title insurance company could act as though the easement of the right-of-way had been extinguished. The grantor, Winkelman, did not have indefeasible title to the right-of-way at the time of the sale to Harris. Hence, both parties had to treat their conveyance as though Burlington Northern could still assert a claim, of some type, to the right-of-way. In fact, BN asserted continuing rights to the property at the time of Winkelman's sale to Harris. *See # 8, App. H-3.* The railroad was also continuing to pay property taxes on the right-of-way, and it left a long trestle on the disputed property as well. Approximately one and a half years after abandonment, BN made an offer to sell Harris her portion of the right-of-way. *See App. I-4-5.* BN letter date July 14, 1986. BN did not disclaim its interest in the right-of-way until December 28, 1987, after it was compelled to do so by the quiet title law suit of Harris et al.

12. Termination of Easement: Necessity of re-entry by grantor

Since the federal courts have construed these railroad rights-of-way to be easements, what effect did the ICC certificate of abandonment have on the title to Winkelman's land? The answer is that the title was still encumbered by the right-of-way, post ICC abandonment notice, because easements can only be terminated by a legal action of the grantors against the grantee of the easement: quiet title, ejectment, obtainment of a disclaimer, quit claim, or action or notice of re-entry. See 136 ALR 316, #3. 19 Am Jur 489, Estates § 29: Necessity of re-entry by grantor.

> "If an estate is granted upon a condition subsequent (that is an easement for a specific purpose like a railroad right-of-way), the interest of the grantee or

his successors-in-interest does not terminate automatically upon breach of the condition, but continues in existence until the creator of the estate upon condition subsequent, or his successors exercise the power of termination, or as it is commonly spoken of in the cases, the right of re-entry for condition broken."

"The rule that a re-entry by the grantor in a deed conveying an estate subject to condition subsequent is necessary to revest in him the title to the land after a breach of the condition, is to some extent reflected in the decisions involving deeds for railroad purposes which create in the grantee an estate subject to condition subsequent. In *Jones v. Southern R. Co.* 1922; CCA 5th, 285 F 19, the Court stated that if the railroad's use of the strip of land were to cease, acting as a breach of the conditions subsequent, the TITLE WOULD NOT BE REVESTED IN THE GRANTORS BY MERE OPERATION OF LAW."

It follows that Winkelman's title did not vest free of the burden of the railroad right-of-way easement, upon the date of the ICC abandonment. The burden was passed with the legal subdivision to Harris who exercised her power of termination, or right to take action, right of re-entry for condition broken. Harris quiet titled the servient estate of the legal subdivision, and removed forever, the encumbrance of the right-of-way, by obtaining the Quiet Title Judgment.

13. Language of Exception Can Have Only One Meaning

Since it has been established that the encumbrance on the title still existed at the time of the warranty deed to Harris, the language of exception for the railroad right-of-way could have only one meaning – to except and reserve an easement for the railroad. It could not have had two meanings – also, to except and reserve the fee for grantor Winkelman. That would be impossible. Nor could it have been intended to reserve a fee for grantor Winkelman by itself by forgetting about the railroad's easement. Becker, author of the deed, confirms that

his allusion was solely to the railroad's continuing interest in the right-of-way. He was legally correct.

14. Floating Easement

As further evidence that Winkelman could not have excepted a fee in the right-of-way for herself, is the fact that upon the date of the ICC abandonment of the right-of-way, the easement became a floating easement, similar to the one that Sam Wilkeson, Jr. received on the title to his land with the deed from Northern Pacific Railroad. The right-of-way had not been fixated to the ground, nor was it until about ten years later. But the floating easement remained on the title to his land, and it was real, albeit, amorphous. Since a floating easement has no definitive boundaries, and cannot be surveyed, the exception of the right-of-way in the Harris deed is not a strip of land in fee, but a floating burden on the title, which cannot be attached to the realty of the land.

15. Insufficient Language of Reservation

Winkelman's claim that the language of reservation intended to except a fee for herself is also refutable on the grounds that it is inappropriate and insufficient. Many court opinions have ruled that language of reservation must be specific and clear. In this case the exception is for Burlington Northern Railroad, no mention is made of Winkelman, her heirs, or any other entity than the railroad itself. Therefore, the exception and reservation can only be for the interest of the railroad, as author of the language has testified under oath. *Barker v. Lashbrook*, 128 Kan. 595, 279 P.12 (1929).

16. Court Opinion on the Effect of Abandonment on the Fee of the Servient Estate

Some courts have delved into the effect of the act of abandonment of a railroad on the fee of the servient estate: *Federal Farm Mortgage Corporation v. Smith*, 149 Kan. 789, 89 P.2d 838 (1939). A mortgage company sued to foreclose a mortgage on a tract of land along one side of which a strip

had been condemned for railway right-of-way purposes *prior* to the execution of the mortgage. The court held that, although the right-of-way strip had been excepted for right-of-way in the original mortgage agreement, and then the land was abandoned for railway purposes prior to foreclosure, the foreclosing morgage included the strip, explaining:

> "The ultimate title to land subjected to railway purposes does not cease to be in the owner of the adjacent freehold from which it was derived, and the termination of its use for railway purposes has no effect upon the fee title. It merely relieves the underlying fee of the dominant estate which had been held by the railway company so long as it was used for railway purposes."

In the *Federal Farm Mortgage* case, the landowner, mortgagee, attempted to except the fee of the land to the right-of-way, for himself, because it was excepted from the wording of the mortgage contract which he signed. Since the court considered the right-of-way to be an easement, it also considered the right-of-way to be an integral part of the moiety of the land – and therefore, no fee could be excepted from the foreclosure, even though it occurred *after* abandonment.

This illustrates how the legal subdivision of parcel 1-003, was passed to Harris, encumbered by the right-of-way, and that regardless of any action by the ICC abandonment, the title to the legal subdivision remained unaffected, but transferred in tact, and encumbered by the floating easement of the right-of-way. Harris then terminated the easement in default action, and the parcel was hers, unencumbered.

17. Title Remains in the Holder of Servient Estate

In *Brown v. Weare*, 152 S.W.2d 649, the Missouri Supreme Court, Division 1, in 1941, determined that no title passes in the grant of an easement, but the title rests and continues in the holder of the servient estate, so that when the easement ceases, there is no reversion of the title, but rather the servient estate is merely freed from the burden of the use granted, and any "reversion" is merely that of the use. This

decision is coincident with *Federal Farm Mortgage v. Smith*, supra.

The *Brown v. Weare* decision also reflected that a plaintiff in an action to quiet title must prevail upon the validity of his own title, not upon defects in the title of his adversary. In this dispute Ski Park relies solely on the quit claim deed from Winkelman out of which has already been extracted the Harris quieted portion of the right-of-way, within the legal subdivision which Harris purchased. Ski Park received no interest in the disputed land from Winkelman, because it had already been conveyed as part of the moiety of Parcel # 1-003 to Harris.

18. Lower Courts Misconstrue Prior Decisions

Both the State Court of Appeals decision and the State Supreme Court decision rely on two cases cited by Ski Park in an attempt to prove an exception for a right-of-way is a fee – not an easement. *Biles v. Tacoma O. & G.H.R.R.*, 5 Wash. 509, 32 P.211 (1893) refers to a dispute over the same type of land grant railroad right-of-way given to the Northern Pacific Railroad by the Act of 1864. The court determined that the right-of-way was an easement, and that a fee was not excepted from the deed, the owner of the legal subdivision was also the owner of the land involved, this being a dispute between the owner of the servient estate and the railroad, which was attempting to make a conveyance for another unchartered branch line upon the servient estate. The railroad was prevented from doing so.

The court in *Bile* also determined that the right-of-way was a floating easement, when the right-of-way was granted, so it could not have excepted the fee of a strip of land. A proper analysis of the *Bile* case is that it serves to confirm Harris' contention that the right-of-way was an easement before, during and after the date of abandonment, until it was terminated by the quiet title action of Harris.

Ski Park cites *Studebaker v. Beek*, 83 Wash. 260, 265, 145 P.225 (1915), and heavy reliance is given by the Washington State Court of Appeals and the Washington Supreme

Court. Ski Park seeks to imply that an "exception" withdraws something from the operation of a deed that would have passed otherwise with the conveyance – and that the exception and reservation of the Harris warranty deed, inherently prevent Harris from obtaining the entire fee interest in the property conveyed.

The response to this is that the historical language of exception in the chain of title from Sam Wilkeson, Jr. through to Sabin, to Winkelman and to Harris, did not except the fee in the right-of-way but reserved a right to operate a railroad on the premises. In the *Studebaker* case, which involved a donation land claim in which a right-of-way easement was granted by Studebaker to a railroad, the language of reservation was both specific and appropriate:

> "Reserving always the fee simple to said lands and premises; it being understood that the use of the land for said railroad purpose is all that is conveyed by this instrument."

This language does not correspond in any respect to the language of exception for the railroad easement in the Harris warranty deed.

Professor William B. Stoebuck, University of Washington School of Law, analyzes the decision of *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 844 P.2d 1006 (2/11/93), "On the meaning of language in railroad's deed – though some Washington decisions have held similar language creates only an easement, in this case parties' intent was to except fee simple – which Winkelman then conveyed to Ski Park. The decision should be compared to earlier decisions, especially *Veach v. Culp*, 92 Wn.2d 570, 579 P.d 526 (1979) and *Swan v. O'Leary*, 37 Wn.2d 533, 225 P.2d 199 (1959). There may be some inconsistency here." (Washington State Bar News, May, 1993, Page 22).

Winkelman had no power to unilaterally terminate the easement of the railroad and convert it into an exception of the fee of the right-of-way for herself, without proper court action. In *Russell v. Martin*, 88 So.2d 315 (1956) it was determined that "Unless an easement is for a fixed period of time, the easement is not revocable by the grantor." The

easement remains, until it is terminated in an appropriate manner.

19. Summary

A phrase worth remembering appeared in the *Hilt v. Weber* opinion (252 Mich. 198, 233 N.W. 159, 167, 71 A.L.R. 1238 (1930)):

> "Because a judicial decision may apply to past as well as to future titles and conveyances, a change in a rule of property is to be avoided where fairly possible. But where it clearly appears that a decision, especially a recent one, was wrong, and continuing injustice results from it, the duty of the court to correct the error is plain."

Based on the foregoing facts, parol and extrinsic evidence, state and federal case law, this Petition for Writ of Certiorari should be granted, and the Court should summarily reverse on the grounds that Petitioner Harris possesses property rights which vested in her pursuant to 42 Statute 414, U.S.C., Title 43 Section 912.

CONCLUSION

We respectfully request that this court accept the Petition for Writ of Certiorari for reasons which include the following:

1. The decision in the lower court jeopardizes the private property rights of numerous citizens who have legitimate reversionary interests in portions of abandoned railroad rights-of-way pursuant to 43 U.S.C. 912.

2. The decision in the court below does not conform with the opinion of federal courts that railroad rights-of-way are easements of special purpose and not fee simple strips of land.

3. The lower court decision does not recognize that a railroad must disclaim, quitclaim, or default on its interest in an abandoned railroad right-of-way for title of the servient estate to vest free of the encumbrance of the right-of-way.

4. The lower court's decision does not recognize that the issuance of a certificate of abandonment by the Interstate

Commerce Commission does not trigger an instantaneous termination of the easement of the right-of-way on the title of the servient estate.

5. The court below failed to give proper weight to the evidence at hand: The Declaration of Becker, the agent of the grantor, stated that he was never given instructions to withhold the fee when he drafted the language of the warranty deed, and that if he had been so ordered, he would have used different language.

6. The lower court issued an opinion on the intent of the grantee, when her certified signed declaration testifying to her intent was not sent to the lower court when the Clerk of the Pierce County Court had been given orders to do so. Rather, an unsigned statement was sent, which the court refused to consider. Petitioner Harris was, thereby, deprived of "equal protection of the law", the right to testify on her own behalf and have her declaration weighed by the court, as other parties had theirs weighed. This violates Amendment 13 of the United States Constitution. Section 1. Civil rights: . . . "nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (The lower court had the liberty to reconsider, after it was sent the certified declaration of the Petitioner.)

7. The lower court's decision has equated the act of railroad abandonment with the title to the servient estate vesting free of the encumbrance of the easement.

8. The lower court failed to recognize that encumbrances to warranty deeds are legal and binding on both grantor and grantee: both grantor and grantee had accepted the lis pendens to quiet title to certain portions of the abandoned Burlington Northern Railroad right-of-way and this encumbrance became legal and valid, pursuant to RCW 64.04.010. Washington State law: "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed" . . . made in accordance with the provisions of this section are hereby declared to be legal and valid."

9. There is a conflict between the federal courts as to what constitutes an abandonment:

The U.S. District Court, South Dakota, N.D., in *City of Aberdeen v. Chicago and North Western Transportation Co.*, 602 F. Supp. 589 (1984) determined that once a railroad ceases using right-of-way for railroad purposes, the easement disappears and the underlying landowner has use of the property he already owns. The implication of this opinion is that title to the servient estate vests free immediately of the burden of the easement.

The opinion of the U.S. District Court, Idaho (1985) in *State of Idaho v. Oregon Short Line Railroad Company*, 617 F. Supp. 213 (D.C. Idaho 1985), conflicts with the previous decision. This opinion stated that for an abandonment to occur the following must first occur:

a. The railroads must cease paying taxes.
b. The railroads must take up the tracks and other railroad structures or make the line unusable.
c. The railroads must have the intent to abandon – as evidenced by statements and conduct.
d. The railroads must cease using the line for any railroad purposes.
e. This court or Congress must decree that abandonment has occurred.

This latter opinion imposes many conditions on the perfection of the act of abandonment.

In the disputed case, the railroad continued to pay taxes on the entire right-of-way. The railroad made no disclaimer of its interest in the right-of-way until it was compelled to do so by Petitioner Harris in the quiet title action of December 31, 1987. The railroad left ten trestles in place, one on the disputed property. So, based on this federal court decision, the abandonment of the right-of-way had not been perfected on October 29, 1987, the date of the warranty deed to Petitioner Harris. The conflict between these federal decisions on railroad abandonment needs to be resolved by this Court.

10. The decision in the lower court does not recognize that language of reservation for the grantor must be sufficient

to reserve a fee interest to the grantor, at any time, either pre-abandonment or post-abandonment, when no quiet title action, nor disclaimer of interest by the railroad has been legally recorded.

11. The decision of the lower court does not recognize that the phrase "excepting railroad right-of-way" in a chain of title which means excepting an easement before the date of abandonment, cannot be construed as excepting a fee for the grantor, after the date of abandonment, when the grantor has taken no action to quiet title, eject, re-enter or clear title to the servient estate.

12. The decision of the lower court does not recognize that claimants/owners of abandoned portions of federal land grant railroad rights-of-way pursuant to 42 Stat. 414, U.S.C. Title 43, Sec. 912, must also take legal action to quiet title, re-enter, or eject in an appropriate court of law for title to vest free of the encumbrance of the right-of-way.

13. The decision of the lower court does not recognize that to convey by warranty deed, a grantor must have indefeasible title to an estate. The issuance of a certificate of abandonment by the Interstate Commerce Commission does not alone vest indefeasible title in the servient estate.

14. The decision of the lower court fails to recognize that 42 Stat. 414, U.S.C. Title 43, Sec. 912, Disposition of Abandoned Railroad Rights of Way, requires, by implication, that the railroad must be formally notified, and become a party to a quiet title action, so that any conveyance or covenant which was established on the right-of-way during the tenure of the railroad, can be legally established and protected.

15. The opinion of the lower court fails to recognize that Section 3, Land Grant Act of 1864, railroad rights-of-way are currently construed by federal courts to be easements rather than limited fees with an implied condition of reverter.

DATED this 7th day of September, 1993.

Respectfully submitted,

DANIEL J. OEHLER

Attorney for Petitioner

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARY E. HARRIS.	)	Number 58600-4
Petitioner.	)	En Banc
v.	)	Filed Feb 11, 1993
SKI PARKS FARMS, INC.,	)	
Respondent.	)	

SMITH, J. – Petitioner Mary E. Harris asks for review of a decision of the court of Appeals reversing the trial court's summary judgment which quieted title in petitioner to a parcel of property burdened with a railroad right of way. The Court of Appeals remanded to the Superior Court with instructions to enter summary judgment quieting title in Respondent Ski Parks Farms, Inc. We granted review and affirm the Court of Appeals.

The single issue before the court in this case is whether the Court of Appeals erred in granting summary judgment in favor of Respondent Ski Park Farms, Inc., and ruling that a statutory warranty deed from its predecessor in title, Winkelman, to Petitioner Harris reserved or excepted a fee interest, and not merely an easement, in the abandoned railroad right of way property.

On July 2, 1864, pursuant to the 1864 Land Grant Act,[1] Northern Pacific Railroad Company (Northern Pacific) acquired ownership to a parcel of land described

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[1] Land Grant Act of 1864, 13 Stat. 365.

in the original handwritten conveyance as "the East half of the North East quarter of section twenty-seven (27) of Township nineteen (19) North, range five (5) East of the Willamette Meridian."[2] Petitioner Harris in her brief refers to the property as the "southeast quarter of the northeast quarter of Section 27, Township 19 North, Range 5 E."[3] On August 12, 1876, the Northern Pacific Railroad Company, by deed, conveyed certain property in Pierce County to Samuel Wilkeson, Jr. The deed included the legal description of the disputed property and contained an exception as follows:

> [The] East half of the North East quarter of section twenty seven (27) of Township nineteen (19) North, range five (5) East of the Willamette Meridian. . . .
>
> [R]eserving and excepting, however, from the above described premises *a strip of land two hundred feet wide, extending through the same on the line of the railroad* of the said Northern Pacific Railroad Company or on the line of any of its branches, *to be used for a right of way,* or for other railroad purposes, in case the line of said railroad or any of its branches has been or shall be located on or over said described pieces or parcels of land and premises, (being part of the same land granted to the party of the first part by the United States of America under and by virtue of the said Act of Congress, approved the second day of July 1864, and included in the

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[2] Clerk's Papers, at 182.

[3] Brief of Petitioner, at 4. This is consistent with the legal description in the title report dated November 10, 1987. Clerk's Papers, at 255.

> aforesaid mortgage,) together with all and singular, the improvements waters, water courses rights, liberties, privileges, herditaments and appurtenances whatsoever thereunto belonging or in any wise appertaining, and the reversions and remainders, rents issues and profits thereof and all the estate, rights title interest, profits claim and demand whatsoever, of them the parties of the first and second parts in law equity or otherwise, howsoever of in and to the same and every part thereof. . . . [4]

(Italics ours.)

The trial court in its order granting summary judgment[5] and the Court of Appeals in its opinion[6] use the same legal description used by appellant and substantially the same language of the exception. However, the tax deed relied upon by Petitioner Harris identifies the property as "[t]hat portion of the northeast quarter of the northeast quarter of Section 27 township 19 north range 5 east lying southeasterly of Orting-South Prairie Highway Except railroad right of way Easement of record."[7]

Subsequent conveyances of the parcel passed the property from Hiram O. and Ethel E. Sabin to John J. and

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[4] Clerk's Papers, at 182. The language is transcribed from a copy of the original handwritten deed included in the Clerk's Papers, the original of which is on file in volume 5 of Deeds, Pierce County, at 351-54.

[5] Clerk's Papers, at 346.

[6] Harris v. Ski Park Farms, Inc., 62 Wn. App. 371, 814 P.2d 684 (1991).

[7] Clerk's Papers, at 84.

Opel V. Winkelman on May 10, 1946.[8] The warranty deed contained the following legal description:

> [T]he northeast quarter of southeast quarter, and that part of the southeast quarter of northeast quarter of Section Twenty-seven (27), Township Nineteen (19) North, Range Five (5) East of the Willamette Meridian, lying east of the South Prairie Creek:
>
> *EXCEPT the right of way of the Northern Pacific Railway Company* . . . and EXCEPT tracts appropriated by Northern Pacific Railway Company in Cause No. 74807 . . . and Pierce County in . . . Cause No. 44906.[9]

(Italics ours.) Petitioner Harris acquired the property by a tax deed dated December 20, 1983, from the Pierce County Assessor-Treasurer. That deed described the property as:[10]

> Parcel No. 05-19-27-1-006
>
> That portion of the northeast quarter of the northeast quarter of Section 27 township 19 north range 5 east lying southeasterly of Orting-South Prairie Highway Except railroad right of way Easement of record.

Burlington Northern Railroad Company (Burlington Northern) acquired Northern Pacific's interest in the right

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[8] Clerk's Papers, at 200. The record does not indicate intervening conveyances prior to Sabin's conveyance to Winkelman.

[9] Clerk's Papers, at 303.

[10] Clerk's papers, at 84.

of way.[11] On December 7, 1984, the Interstate Commerce Commission authorized Burlington Northern to abandon the right of way. It was abandoned by Burlington Northern on February 15, 1985,[12] pursuant to 43 U.S.C. § 912, which provides:

> Whenever public lands of the United States have been . . . granted to any railroad company for use as a right of way for its railroad . . . and use and occupancy of said lands for such purposes has ceased . . . by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon, all right, title, interest, and estate of the United States in said lands shall . . . . be transferred to and vested in any person . . . to whom . . . title of the United States may have been . . . granted, *conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad- . . . without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever.* . . . [13]

At the time of abandonment, Ms. Opel V. Winkelman and the Winkelman Family Trust (Winkelman) held title to the land subject to the right of way. Although Winkelman was not aware that the right of way had been abandoned, pursuant to 43 U.S.C. § 912 title to the right of way vested in Winkelman upon its abandonment.

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[11] Clerk's Papers, at 22. The record does not indicate the date of this acquisition.

[12] Clerk's Papers, at 248.

[13] (Italics ours.) 43 U.S.C. § 912.

On April 23, 1987, Winkelman by real estate contract conveyed 60 acres of the parcel (Lot 6) to Ski Park Farms (Ski Park) for $143,500.[14] On July 24, 1987, Ms. Mary E. Harris (Harris) entered into a purchase and sale agreement with Winkelman for two parcels of the property, one of which was bisected by the right of way. The sale price was $7,000. Ms. Harris prepared the legal description of the property for the purchase and sale agreement, signed by Winkelman, which included the following description:[15]

> All of that portion of tax parcel #05-19-27-1-003 lying between State Route 162 (Pioneer Way) and the South Prairie-Carbon River Road *excepting the Northern Pacific Railroad right-of-way easement*.
>
> All of that portion of tax parcel #05-19-26-2-007 lying between the South Prairie Creek and the South Prairie-Carbon River Road *excepting the Northern Pacific railroad right-of-way easement*.

(Italics ours.)

The sale to Ms. Harris closed on October 29, 1987. The closing documents, including the deed and preliminary title insurance, were reviewed by Ms. Harris and her

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[14] Clerk's Papers, at 201. The contract reserved "a 30 foot non-exclusive easement for ingress, egress and utilities. . . ." The document in the file is not signed, but a declaration asserts that the transaction was executed. That assertion is not contested. Clerk's Papers, at 216.

[15] Clerk's Papers, at 245. The document referred to a sketch which was attached.

attorney prior to closing. The statutory warranty deed included the following descriptions:

> PARCEL A:
>
> That portion of the West Half of the Northwest quarter of section 26, Township 19, North range 5 East, Willamette Meridian, Pierce County, Washington lying, Southeasterly of South Prairie Creek and Northwesterly of South Prairie-Carbon River County Road, *Excepting there from right of way of the Burlington Northern (Formerly Northern Pacific) Railway Company.*
>
> PARCEL B:
>
> That portion of the Southeast Quarter of the Northeast Quarter of Section 27, Township 19, North Range 5 East of the Willamette Meridian. Pierce County, Washington, which lies Southeasterly of the Southeasterly margin of State Route 162 (Pioneer Way) and northwesterly of South Prairie-Carbon River County Road, *Excepting there from right of way of the Burlington Northern (formerly Northern Pacific) Railway Company.*[16]
>
> Situate in Pierce County, Washington.
>
> SUBJECT TO Easements. Restrictions, Reservations, Conditions, and Provisions of record.

(Italics ours.)

On February 24, 1988, Winkelman by quitclaim deed conveyed its interest in the right of way to Ski Park,

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[16] Clerk's Papers, at 207, 255.

reserving to Winkelman "a 30 foot non-exclusive easement for ingress[,] egress and utilities. . . . "[17] The deed conveyed:

> That portion of the Burlington Northern Railroad Company's (formerly Northern Pacific Railway Company) McMillan to Buckley, Washington Branch Line right-of-way, now abandoned, located upon, over and across section 27, Township 19 North Range 5 East, W.M., described as follows:
>
> All that portion of said Railroad Company's 400 foot wide Branch Line right-of-way being 200 feet on each side of said Main Track centerline in the North half of the Southeast quarter of said Section 27, lying Northerly of the West production of the South line of Lot 6 of Survey No. 8701200255, recorded January 2, 1987, and South of the North line of said North half of the Southeast quarter of said Section 27.
>
> Also all that portion of said Railroad Company's 200 foot wide Branch Line right-of-way being 100 feet on each side of said Main Tract centerline in the Southeast quarter of the Northeast quarter of said Section 27, lying North of the south line of said Southeast quarter of the Northeast quarter of said Section 27, and lying South of North line of said Southeast quarter of the Northeast quarter of said Section 27.
>
> Additional Terms and conditions: see schedule A, attached.
>
> . . . .

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[17] Clerk's Papers, at 212-13.

SCHEDULE A

EASEMENT AND RESERVATION

The sellers herein further *RESERVE* unto themselves, their heirs, successors and assigns a 30 foot non-exclusive easement for ingress[,] egress and utilities along the south line of which is the West Production of the South line of lot 6 of survey No. 8701200255, for the benefit of Lots 4 and 5 of said survey and each and every subdivision thereof.

Said easement may also be conveyed by the sellers herein to each and every lot owner between the Carbon River and the South line of Lot 6 of said survey or any future reciprocal easement agreements.

On March 10, 1988, in a third amended complaint, Petitioner Harris brought an action against Ski Park to quiet title to the right of way property.[18] Ski Park filed a motion for summary judgment and Ms. Harris filed a cross motion for summary judgment to quiet title. On July 5, 1988, Judge E. Albert Morrison, Pierce County Superior Court, denied both motions, concluding that the matter presented factual questions which could not be resolved on summary judgment.[19] Both parties filed motions for reconsideration. On July 22, 1988, the court

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[18] Clerk's Papers, at 135. Petitioner Harris and 39 other plaintiffs (Citizens Against the Trail) initially filed a quiet title action on February 20, 1987. Ski Park was joined as a defendant with an interest in the subject property. Since the claims between Ms. Harris and Ski Park were unlike the claims of the other parties, the trial court bifurcated the action. Only Petitioner Harris is a party before this court. Clerk's Papers, at 173.

[19] Report of Proceedings, at 64.

heard the motions. At that time, counsel for both parties agreed that all material facts in the case were before the court.[20]

The trial court later on September 7, 1988, granted summary judgment quieting title in Petitioner Harris.[21] The court considered the declarations of several persons. Clark R. McGowan (McGowan), a real estate broker, was Winkelman's representative in the sale. He declared that no verbal or written representation was made to convey the right of way to Harris and that the exception language clearly showed intent not to convey the right of way.[22] McGowan employed John Becker (Becker), a professional land surveyor, to draft the legal description in the deed. Becker declared that Winkelman expressed no intention to reserve a fee interest in the right of way, that the exception language was to recognize that Burlington Northern had and might still have an interest in the right of way, and that if he had been instructed to prepare a deed that reserved a fee interest in the right of way, he would not have used the language that appears in the deed.[23]

The declaration of Winkelman stated that it would not have quitclaimed the right of way to Ski Park if it believed the property had already been conveyed to Ms. Harris and that it did not sell any ownership rights to the

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[20] Report of Proceedings, at 108.

[21] Clerk's Papers, at 344.

[22] Clerk's Papers, at 259.

[23] Clerk's Papers, at 266.

right of way property to her.[24] However, Ms.Harris in an unsigned declaration asserted that it was her intention to acquire a fee interest in the property formerly subject to the right of way, and that it was her understanding that she was acquiring the underlying fee in the right of way from Winkelman.[25] We can give no credence to the declaration because it was not signed and contained the notation "Original to be filed when signature obtained".[26] The record before us does not contain the signed document.

The parties stipulated before the trial court that there were no facts material to resolution of the motions for summary judgment which were not before the court.[27]

On appeal, the Court of Appeals, Division Two, reversed the trial court and quieted title in Ski Park. The court held that in the conveyance to Petitioner Harris, Winkelman intended to "reserve whatever interest in the right of way they owned." The court noted that "[a]lthough not known to Winkelman, the right of way had been abandoned and Winkelman now owned all interest in the property where the right-of-way had previously existed." It further stated that "[i]f the conveyance to Harris was intended to transfer the property where the

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[24] Clerk's Papers, at 216.

[25] Clerk's Papers, at 261.

[26] Clerk's Papers, at 265.

[27] Report of Proceedings, at 96, 97, 99, 108.

right of way had existed, the exception language was superfluous."[28] The court concluded that:[29]

> [W]inkelman intended to reserve the property where the abandoned right of way traversed the quarter sections Winkelman conveyed to Harris. The later conveyance from Winkelman to Ski Park vested title to the abandoned right of way property in Ski Park. The court erred in quieting title to the abandoned right of way property in Harris.

The court then remanded to the trial court with instructions to enter summary judgment quieting title in Ski Park "to that disputed portion of the abandoned right of way property described in Winkelman's quitclaim deed to Ski Park Farms, Inc."

On December 3, 1991, this court granted review.

Petitioner Harris claims that she acquired from Winkelman a fee interest in the right of way. She acknowledges that the 1987 warranty deed from Winkelman to her contains the clause "excepting there from right of way of the Burlington Northern (formerly Northern Pacific) Railway Company." However, she contends that this excepts merely an easement and not the underlying fee interest. She further contends that abandonment of the right of way by Burlington Northern in 1985 by operation of law resulted in her acquisition of the fee interest in the right of way. Ski Park claims a fee interest in the right of way

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[28] *Harris v. Ski Park Farms, Inc.*, 62 Wn. App. 371, 377, 814 P.2d 684 (1991).

[29] *Harris*, at 377.

through its 1988 quitclaim deed from Winkelman. It contends that the exception in the warranty deed from Winkelman to Harris excepted a fee interest in the right of way; and that the subsequent quitclaim deed from Winkelman to Ski Park thus gave Ski Park the fee interest in the right of way.

Summary judgment is appropriate "if the pleadings, depositions, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[30] A material fact is one upon which the outcome of the litigation depends.[31] The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.[32] On review of summary judgment an appellate court engages in the same inquiry as the trial court.[33]

The term "right of way" may mean a "mere right of passage over a tract, and sometimes to describe the strip of land which railroad companies purchase, or otherwise compulsorily acquire, upon which to construct their

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[30] CR 56(c).

[31] *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977).

[32] *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982).

[33] *Marincovich v. Tarabochia*, 114 Wn.2d 271, 787 P.2d 562 (1990).

railroad."[34] The term "easement" means a "right, distinct from ownership, to use in some way the land of another, without compensation."[35]

"A conveyance of a right-of-way to a railroad may be either in fee simple or may be an easement only."[36] "The interpretation of such a deed to determine its effect is a mixed question of fact and law. It is a factual question to determine the intent of the parties. Then we must apply the rules of law to determine the legal consequences of that intent."[37]

This court in *Morsbach v. Thurston County* stated that a railroad right of way is more than an easement.[38] But that statement was clarified in *Swan v. O'Leary,* which stated that the intention of the parties to the conveyance is of paramount importance and must ultimately prevail in a given case.[39] In determining the intent of the parties, courts have considered whether the consideration was substantial or nominal, whether the deed conveyed a strip or tract of land and limited its use to a specific purpose, whether the deed contained a habendum clause, and whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would

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[34] *Morsbach v. Thurston Cy.*, 152 Wash. 562, 568, 278 P. 686 (1929).

[35] *Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986).

[36] *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

[37] *Veach*, at 573.

[38] *Morsbach v. Thurston Cy.*, 152 Wash. 562, 278 P. 686 (1929).

[39] *Swan v. O'Leary*, 37 Wn.2d 533, 225 P.2d 199 (1950).

revert to the grantor.[40] When the granting clause of a deed conveys a right of way to a railroad, this court has usually concluded that the deed passes an *easement* and not a *fee with a restricted use:*

> [I]t is clear that we adopted the rule that when the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad the deed passes an easement only, and not a fee with a restricted use, even though the deed is in the usual form to convey a fee title.[41]

In *Veach v. Culp,*[42] the court reiterated the "well established principle", that "we must look to the actual use being made of . . . [the] easement in light of the rule that the servient owner retains the use of the easement so long as that use does not materially interfere with the use by the holder of the easement."[43] The plaintiffs in that case sought removal of a chain link fence blocking their access along a railroad right of way which crossed their property. The railroad made minimal use of it track. The court concluded that because of the railroad's limited use of the easement, the plaintiffs, as holders of the subservient estate, were entitled to use the right of way in such a manner that it would not materially interfere with the railroad's use of it.

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[40] *Swan v. O'Leary, supra.*

[41] *Veach v. Culp,* 92 Wn.2d 570, 574, 599 P.2d 526 (1979) (quoting *Swan v. O'Leary, supra*). *See King Cy. v. Squire Inv. Co.,* 59 Wn. App. 888, 801 P.2d 1022 (1990) (Washington cases show a strong tendency to consider such rights of way as easements).

[42] 92 Wn.2d 570, 599 P.2d 526 (1979).

[43] *Veach,* at 575.

Both Petitioner Harris and Ski Park agree that this case involves an interpretation of deeds problem. The interpretation of a right of way deed is a mixed question of fact and law.[44] A court should construe a deed grant in a manner which gives effect to the intent of the parties.[45] The intent of the parties is to be derived from the entire instrument and, if ambiguity exists, the situation and circumstances of the parties at the time of the grant are to be considered.[46]

Since both Harris and Ski Park filed motions for summary judgment, the facts must be reviewed in the light most favorable to the nonmoving party in considering each motion.

I

Ski Park Motion For Summary Judgment

Ski Park argues that in the grant from Winkelman to Ms. Harris, it was the parties' intent to except a fee interest in the right of way and not merely an easement and that Winkelman therefore subsequently quitclaimed to Ski Park a fee interest in the right of way. In support of its position. Ski Park argues (1) that the terms "excepting" and "right of way" except a fee interest, (2) that because Winkelman owned the right of way in fee at the time of the grant to Ms. Harris, the deed excepted a fee interest, and (3) that the doctrine of merger prevents use

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[44] *Veach v. Culp, supra; Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 567, 716 P.2d 855 (1986).

[45] *Zobrist v. Culp*, 95 Wn.2d 556, 627 P.2d 1308 (1981).

[46] *Zobrist*.

of the purchase and sale agreement to interpret an ambiguity in the deed.

Ski Park cites an early case to define the term "exception" as a "clause in a deed which withdraws from its operation some part of the thing granted, and which would otherwise have passed to the grantee under the general description [and] [t]he part excepted is in existence at the time of the grant, and remains . . . unaffected by the conveyance."[47] Using this definition, it argues that use of the term "excepting" necessarily prevents the grantee, Ms. Harris, from obtaining the entire fee interest in the property conveyed because Northern Pacific reserved a right of way, within its ordinary meaning, and because, before signing, Ms. Harris and her attorney reviewed the closing documents which made no reference to an easement.

An easement is a burden on the land and an interest in land.[48] The term "excepting" arguably could have been used by the parties to express their understanding that, although Ms. Harris was receiving a fee interest, her rights were not plenary, but subject to an easement. This would be consistent with Ms. Harris' assertion that she thought the deed was excepting only an easement and that she was in fact acquiring the underlying fee to the

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[47] *Biles v. Tacoma, O. & G.H.R.R.*, 5 Wash. 509, 32 P. 211 (1893). *See also Studebaker v. Beek*, 83 Wash. 260, 265, 145 P. 225 (1915).

[48] *Kesinger v. Logan*, 113 Wn.2d 320, 779 P.2d 263 (1989) (an easement is an interest in land within the purview of the conveyance statute).

railroad right of way, but this assertion is not properly before us.[49]

The deed from Northern Pacific to Wilkeson did not explicitly reserve a fee. The right of way thus arguably could be considered as either a fee interest or simply an easement. The deed description of the right of way ("a strip of land two hundred feet wide") and its purpose ("to be used for a right of way, or for other railroad purposes") would ordinarily create an easement only and not a fee simple interest.[50] This is inconsistent with Ski Park's arguments that Northern Pacific reserved a fee and that the common meaning of a right of way is a fee interest. Similarly, the fact that Ms. Harris and her attorney reviewed the closing documents and did not object to lack of reference to an easement does not necessarily support Ski Park's conclusion that a fee was excepted. Further, the deed was prepared by Winkelman's agent. Becker, who stated that if he had been instructed to reserve a fee interest, he would not have used the language used in the deed. This assertion, of course, is speculation and cannot of itself be used to establish the intent of Winkelman.

Burlington Northern abandoned the right of way in 1985, 2 years prior to Winkelman's conveyance to Ms. Harris. Ski Park argues that if the exception clause is interpreted as withholding only an easement, nothing would be withheld because the right of way no longer

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[49] Clerk's Papers, at 265. We cannot consider this assertion because it is contained only in an unsigned declaration.

[50] *Veach*, at 574.

existed and Winkelman held the entire parcel in fee at the time it conveyed to Harris. The Court of Appeals, in granting summary judgment in favor of Ski Park, also focused on abandonment of the right of way. The Court of Appeals concluded that since the right of way was no longer in existence. Winkelman intended to reserve in fee the property where the right of way once existed. The court stated that its conclusion as to Winkelman's intent was necessary because to hold otherwise would make the exception language "superfluous". However, that language would be superfluous only if Winkelman intended to except an easement knowing that an easement no longer existed. Since Winkelman did not know of the abandonment (and the resulting fee interest), it cannot be said with certainty that it intended to reserve the fee interest in the right of way. This court has held that the intent of the parties must prevail. The real estate contract between Winkelman and Ski Park dated April 23, 1987, which antedates the October 29, 1987, statutory warranty deed to Petitioner Harris, at least provides some support to a conclusion that Winkelman intended to reserve a fee interest in the railroad right of way, notwithstanding the confusion created by the language in the purchase and sale agreement prepared by Petitioner Harris.

Ski Park finally argues that, under the doctrine of merger, the purchase and sale agreement merged into the deed. The trial court, in granting summary judgment in favor of Ms. Harris, relied on the language of the purchase and sale agreement. However, the Court of Appeals held that the purchase and sale agreement was not controlling because it merged into the deed. Both Ski Park and the Court of Appeals rely on *Black v. Evergreen Land*

Developers.[51] However, that case recognized that there were exceptions to the merger doctrine. This court has held that where the intent of the parties is not clearly expressed in the deed, courts may consider parole evidence.[52] in order to determine the intent of the parties, extrinsic evidence is admissible as to the entire circumstances under which a contract is made.[53]

This court has adopted the "context rule" which succinctly stated is that "extrinsic evidence is admissible as to the entire circumstances under which [a] contract [is] made, as an aid in ascertaining the parties' intent", specifically adopting the Restatement (Second) of Contracts §§ 212, 214(c) (1981).[54]

This court in *Berg v. Hudesman*[55] rejected "the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible" and overruled cases to the contrary.[56]

The purchase and sale agreement in this case may be considered as some evidence of the circumstances of the parties at the time of the grant. Even considering, in the light most favorable to Ms. Harris, that both Winkelman and Harris signed the purchase and sale agreement, a conclusion that the parties intended to except only an

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[51] 75 Wn.2d 241, 450 P.2d 470 (1969).

[52] *Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 269, 714 P.2d 1170 (1986).

[53] *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

[54] *Berg*, at 667, 668.

[55] 115 Wn.2d 657, 801 P.2d 222 (1990).

[56] *Berg*, at 669.

easement and not a fee interest ("excepting the Northern Pacific railroad right of way easement") is tenuous, at best.

Applying the rules on summary judgment, the undisputed facts in this case and the law favor summary judgment for Respondent Ski Park Farms.

II

Harris Motion For Summary Judgment

Petitioner Harris' position is that the deed excepted only an easement and since the easement was extinguished by the abandonment, she acquired a fee interest in the entire parcel. She argues that the parties intended to except an easement and not a fee interest in the right of way and that an ambiguous deed should be interpreted in favor of the grantee. She further contends that the Court of Appeals erred in granting summary judgment in favor of Ski Park by concluding that the right of way had been abandoned when Winkelman did not even know of the abandonment at the time it granted the property to her.

To support her position that the parties intended to except an easement, petitioner argues that she used the term "easement" in the purchase and sale agreement, which was signed by Winkelman; that the phrase "railroad right of way" historically reserved an easement; and the language in the deed reflects the historical interpretation of the phrase. She further argues that her quiet title action was known to Winkelman and that was evidence that both parties knew that Harris intended to acquire the fee interest in the right of way. She also claims that

because Winkelman did not know of abandonment of the right of way by the railroad, it could not have intended to except a fee interest it did not know it had. Any facts relating to the intent of the parties must be obtained from sources other than Petitioner Harris. Her declaration is unsigned and cannot be considered on the record before us.

Use of the term "easement" in the purchase and sale agreement and the historical interpretation of the phrase "railroad right of way" may provide some indication of Ms. Harris' intent to except only an easement, but it does not lead to the same conclusion on Winkelman's intent. Winkelman has stated that it did not intend to transfer any ownership rights in the right of way to Ms. Harris. If Winkelman knew of her quiet title action, it may indicate some knowledge that Ms. Harris wanted a fee interest, but it does not indicate Winkelman's intent to convey a fee interest. McGowan, seller Winkelman's agent, stated that the sellers gave no indication of an intent to convey the right of way to Ms. Harris at closing or at any time in the future. Although Winkelman did not know the right of way had been abandoned and that it now held reversionary title to it, it meant to reserve under the exception whatever interest it had. Winkelman stated that its understanding of the exception language was that it excepted conveyance of the right of way regardless whether it was an easement or a fee interest. Therefore, viewing the facts in the light most favorable to Ski Park, it cannot be said that the one conclusion reasonable persons could reach is that the parties intended to convey only an easement and not a fee interest.

Petitioner Harris argues that the deed should be construed in favor of the grantee. She states that the facts supporting her contention are that the deed was prepared by Becker, grantor Winkelman's agent; that Becker stated that he was not told to withhold the fee in the conveyance; and Becker stated that if he had been so instructed, he would have used language different from that used in the deed.

While ambiguity in a deed is resolved against the grantor,[57] the intent of the parties is of paramount importance.[58] The statutory warranty deed dated October 29, 1987, is not ambiguous. Any ambiguity is created by the language of the July 24, 1987 purchase and sale agreement. Winkelman stated that it did not intend to sell any ownership rights in the right of way. Viewing this fact in the light most favorable to Ski Park, it is reasonable to conclude that Winkelman intended to except a fee interest in the property and not merely an easement.

Petitioner Harris further argues that because neither party knew the status of the right of way, there was no intent to act as if the right of way had been extinguished and held in fee by Winkelman. However, on the record in this case, Ms. Harris could have known that the right of way was held by Winkelman in fee. Ms. Harris initiated a quiet title action in February 1987, 8 months prior to closing her purchase from Winkelman. In her complaint, she acknowledged that Burlington Northern abandoned

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[57] *Kunkel v. Meridian Oil, Inc.*, 114 Wn.2d 896, 901, 792 P.2d 1254 (1990).

[58] *Swan*, at 535.

the right of way in 1985 and that upon abandonment, the right of way immediately vested in the original grantors or their successors. One may infer that she knew Winkelman held a fee interest in the right of way and she nevertheless agreed to the exception. Petitioner contends that Burlington Northern's claim to the right of way was unsettled at the time of the conveyance. The only support for her contention is a letter she received from the Pierce County Prosecuting Attorney in January 1987 which advised her that Burlington Northern had not abandoned its claim to ownership to the property. Although there is no clear evidence that she had actual knowledge of ownership, she might logically have insisted that Winkelman quitclaim the right of way to her if she intended to acquire the fee interest in the right of way. This she did not do. As to Winkelman's intent, it stated that it would not have quitclaimed the right of way to Ski Park if it believed that it had already conveyed the property to Ms. Harris. Subsequent acts of a party to a contract are admissible to assist in ascertaining intent.[59] Winkelman's subsequent quitclaim of the right of way to Ski Park, and its prior sale by real estate contract, is consistent with its intent to convey only an easement to Petitioner Harris.

We agree with the Court of Appeals that the trial court erred in granting summary judgment quieting title in Petitioner Harris and that summary judgment should be granted in favor of Respondent Ski Park Farms, Inc., quieting title in it.

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[59] *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 510 P.2d 221 (1973).

From the record in this case, we conclude that the reservation and exception granting a right of way to the Northern Pacific Railroad reserved and excepted a fee interest in the property; and that abandonment of the right of way by the railroad resulted in reversion to the owner of the property (Winkelman), who conveyed by statutory warranty deed a portion of the acreage to Petitioner Harris, reserving a fee interest in the railroad right of way, and conveying the remainder of its property interest by quitclaim deed to Respondent Ski Park Farms, Inc.

We affirm the Court of Appeals and remand the case to the trial court for entry of summary judgment and quiet title in favor of Respondent Ski Park Farms, Inc.

/s/ Smith, Charles

WE CONCUR:

/s/ Dore, C.J. (Fred)
/s/ Utter, Robert
/s/ Brachtenbach, J.
CONCURS IN RESULT ONLY
/s/ Dolliver, James
/s/ Andersen, James
/s/ Durham, J.
/s/ Guy, Richard
/s/ Johnson, Charles

APPENDIX B

THE SUPREME COURT OF WASHINGTON

MARY E. HARRIS, Petitioner, v. SKI PARK FARMS, INC., Respondent.	)	No. 58600-4 ORDER DENYING MOTION FOR RECONSIDERATION (Filed June 8, 1993)

The Court having decided that the petitioner's motion for reconsideration be denied,

It is hereby ordered that the motion is denied.

Dated this 8th day of June, 1993.

/s/ James Andersen
Chief Justice

120 Wn.2d 727

APPENDIX C

THE SUPREME COURT OF WASHINGTON

MARY E. HARRIS, Petitioner, v. SKI PARK FARMS, INC., Respondent.	**MANDATE** No. 58600-4 Pierce County No. 87-2-091090-8 C/A No. 12321-5-II

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Pierce County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on February 11, 1993, became the decision terminating review of this court in the above entitled cause on June 8, 1993. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: No cost bills having been timely filed, costs are deemed wavied [sic]. Order Denying Motion for Reconsideration was entered herein on June 8, 1993. Copy attached.

(seal) IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 10th day of June, 1993.

/s/ C.J. Merritt
C. J. MERRITT
Clerk of the Supreme Court,
State of Washington

APPENDIX D

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

MARY E. HARRIS, a single woman, et al, Respondent, v. SKI PARK FARMS, INC., Appellant.	))))))))	No. 12321-5-II DIVISION TWO FILED: February 25, 1991

PETRICH, J. – Ski Park Farms, Inc. appeals from the trial court's ruling on cross motions for summary judgment[1] that the title to land consisting of an abandoned railroad right-of-way which adjoins Ski Park property should be quieted in Mary E. Harris. The issue is whether the owners of property over which an abandoned railroad right-of-way existed, relinquished their interest in the right-of-way by a conveyance which excepted the

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[1] Harris contends that the trial court resolved the issue based on stipulated facts by entering findings and conclusions. She thus argues that our task on review is simply to determine whether the findings are supported by the stipulation and whether the findings support the conclusions. She is mistaken. The trial court entered its order granting plaintiff's motion for summary judgment which designated the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. RAP 9. 12. No reference whatsoever was made to the findings and conclusions. The trial court's summary judgment order is now on review and, for our purposes, the trial court's findings and conclusions are superfluous. *Duckworth v. Bonney Lake*, 91 Wn. 2d 19, 21-22, 586 P.2d 860 (1978).

railroad right-of-way. We hold that by the exception of the railroad right-of-way from the conveyance, the owners retained their interest in the right-of-way property and we reverse the trial court's summary judgment.

On July 2, 1864, pursuant to the 1864 Land Grant Act, Northern Pacific Railroad Company acquired ownership of a parcel of land legally described as the southeast quarter of the northeast quarter of Section 27, Township 19 North, Range 5 E., (the "property"). Approximately 10 years later, Northern Pacific conveyed the property to Sam Wilkeson, Jr., by warranty deed, reserving and excepting the disputed right-of-way property (the "right-of way") as follows:

> Reserving and excepting, however, from the above described premises, a strip of land two hundred feet wide, extending through the same on the line of the railroad of the said Northern Pacific Railroad Company or on the line of any of its branches to be used for a Right of way or for other railroad purposes, in case the line of said railroad or any of its branches has been or shall be located on or over said described pieces or parcels of land and premises (being part of the same land granted to the party of the first part by the United States of America under and by virtue of the said Act of Congress approved the 2nd day of July, 1864, and included in the aforesaid mortgage).

Subsequent conveyances of the original parcel passed the property from Hiram Sabin to John and Opal Winkelman on May 10, 1946. The warranty deed from Sabin to Winkelman contained the following language of exception relating to the right-of-way:

> EXCEPT, the right of way of the Northern Pacific Railway Company . . . and except tracks appropriated by Northern Pacific Railway Company in Cause No. 74807 . . .

Burlington Northern Railroad Company acquired Northern Pacific's interest in the right-of-way as a successor-in-interest. On December 7, 1984, the Interstate Commerce Commission authorized the abandonment of the right-of-way, which was then abandoned on February 15, 1985 by Burlington Northern.

The abandonment operated to vest title in the property owners abutting the abandoned right-of-way, pursuant to 43 U.S.C. § 912. When Burlington Northern abandoned the right-of-way on February 15, 1985, Opal Winkelman, individually, and Opal Winkelman, Joan Nelson, and Mary Eytinge, as Trustees of the John C. Winkelman Family Trust (Winkelman), held fee title to the land completely surrounding and abutting the right-of-way. Thus, at the time of abandonment, title to the.right-of-way vested in Winkelman.

On April 23, 1987, Winkelman sold approximately 60 acres of the Property to Ski Park Farms, Inc. for $143,500. On July 24, 1987, Harris entered into a real estate purchase and sale agreement with Winkelman for the purchase of property located within two government quarter sections part of which was bisected by a railroad right-of-way thus resulting in three small parcels bounded by either roads, a creek, section lines or the right-of-way. The total sale price was $7,000. Harris, who drafted the legal description, included the following language: "excepting the Northern Pacific railroad right-of-way easement."

The sale closed on October 29, 1987. Prior to closing of the Harris purchase, the preliminary commitment for title insurance and all other closing documents, including the deed, were revealed both by Harris and by an attorney on her behalf. The title policy and the deed included the following exception: "excepting therefrom right-of-way of the Burlington Northern (Formerly Northern Pacific) Railway Company."

Then, on February 24, 1988, Winkelman, by quit claim deed, conveyed to Ski Park Farms, Inc. their fee interest in abandoned right-of-way adjacent to Ski Park. Harris asserts an ownership interest in the right-of-way which is some distance from and not contiguous to her properties.

In reviewing a summary judgment, this court engages in the same review as the trial court. *Del Guzzi Construction Co., Inc. v. Global Northwest Ltd., Inc.*, 105 Wn. 2d 878, 719 P.2d 120 (1986). Summary judgment shall be granted if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c); *Hontz v. State*, 105 Wn. 2d 302, 714 P.2d 1176 (1986).

The issue here is construction of the Winkelman to Harris deed. The construction of a deed generally is a matter of law for the court. *Donald v. Vancouver*, 43 Wn. App. 880, 719 P. 2d 666 (1986). In construing a deed, the intent of the parties controls; particular attention is paid to the intent of the grantor when giving meaning to the entire language of the deed. *Carr v. Burlington Northern*,

Inc., 23 Wn. App. 386, 597 P.2d 409 (1979). The intent must be ascertained from reading the deed as a whole. *McKillop v. Crown Zellerbach, Inc.*, 46 Wn. App. 870, 733 P. 2d 559, *review denied*, 108 Wn. 2d 1015 (1987). The words are to be given their ordinary meaning. 46 Wn. App. at 873. If the terms of the contract are plain and unambiguous, the meaning should be deduced from the language alone without resort to parol evidence. 46 Wn. App. at 873. *See also Petersen v. Schafer*, 42 Wn. App. 281, 709 P. 2d 813 (1985), *review denied*, 105 Wn.2d 1011 (1986).

Harris's position is that the exception in the deed applied only to a railroad easement over the property described, and that since the easement was abandoned, she then owned the fee interest in the property. She relies on the language in the purchase and sale agreement, which excepted "the Northern Pacific railroad right-of-way easement." Her reliance on the purchase and sale agreement is misplaced. Provisions of a real estate contract and sale agreement and all prior negotiations merge into the deed delivered and accepted in fulfillment of the earlier contact. *Black v. Evergreen Land Development, Inc.*, 75 Wn.2d 241, 248, 450 P. 2d 470 (1969). The fact that the term "easement" was eliminated from the deed suggests to us that the parties meant to except something more than an easement.

An exception in a deed is a clause that withdraws from its operation some part of the thing granted and which otherwise has passed to the grantee under the general description. *Studebaker v. Beek*, 83 Wash. 260, 265, 145 P. 225 (1915). At the time of the Harris conveyance, the railroad right-of-way had been abandoned and the

Winkelman interest included the fee interest in the property. If the conveyance to Harris was intended to transfer the right-of-way, the exception language was superfluous. The reference to the abandoned right-of-way in the Harris conveyance was simply a shorthand method of describing the property, without having to describe the conveyed property in metes and bounds. Finally, comparing the price paid by Harris with that paid by Ski Park, it is inconceivable that such a large tract, embracing the right-of-way in the quarter sections involved, was intended to be conveyed to Harris. While it is possible that a factual dispute exists as to whether Winkelman intended to convey to Harris the right-of-way area contiguous to the Harris tracts, it is clear that Winkelman did not intend to convey to her the right-of-way area contiguous the Ski Park property. Title to the area adjoining the Ski Park property is the only issue before us.

We are satisfied that the Winkelman to Harris conveyance was unambiguous and that Winkelman reserved the right-of-way property contiguous to the adjoining Ski Park property. The later conveyance from Winkelman to Ski Park vested in it the adjacent right-of-way property.

Reversed and remanded with instructions to enter summary judgment quieting title to the property within the right-of-way adjacent and adjoined to the Ski Park property in Ski Park Farms, Inc.

/s/ Petrich, J.

WE CONCUR:

/s/ Worswick, Stanley C. J.

/s/ Reed, Edward P.

APPENDIX E

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

MARY E. HARRIS, a single woman, et al, Respondent, v. SKI PARK FARMS, INC., Appellant.	NO. 12321-5-II DIVISION TWO ORDER (Filed Aug. 15, 1991)

This court having considered the motion for reconsideration of its previous opinion in the above entitled case, filed February 25, 1991 in Volume 60 Wn. App. at page 604, does herewith withdraw the prior opinion and adopts the opinion filed this date as the opinion of the court.

DATED this 15 day of August, 1991.

/s/ Petrich J.

/s/ Worswick, Stanley, C.J.

/s/ Reed, Edward P.

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

MARY E. HARRIS, a single woman, et al, Respondent, v. SKI PARK FARMS, INC., Appellant.	NO. 12321-5-II DIVISION TWO AMENDED OPINION Filed: August 15, 1991)

PETRICH, J. – Ski Park Farms, Inc. appeals from the trial court's ruling on cross-motions for summary judgment[1] that the title to land consisting of an abandoned railroad right-of-way should be quieted in Mary E. Harris. The issue is whether the owners of property, over which an abandoned railroad right-of-way existed, relinquished their interest in the property underlying the right-of-way by a conveyance which excepted the right-of-way. We hold that by excepting the right-of-way from

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[1] Harris contends that the trial court resolved the issue based on stipulated facts by entering findings and conclusions. She thus argues that our task on review is simply to determine whether the findings are supported by the stipulation and whether the findings support the conclusions. She is mistaken. The trial court entered its order granting plaintiff's motion for summary judgment which designated the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. RAP 9. 12. No reference whatsoever was made to the findings and conclusions. The trial court's summary judgment order is now on review and, for our purposes, the trial court's findings and conclusions are superfluous. *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978).

the conveyance, the owners retained their interest in the property underlying the right-of-way and we reverse the trial court's summary judgment.

On July 2, 1864, pursuant to the 1864 Land Grant Act, Northern Pacific Railroad Company acquired ownership of a parcel of land legally described as the southeast quarter of the northeast quarter of Section 27, Township 19 North, Range 5 E., (the "property"). Approximately 10 years later, Northern pacific conveyed the property to Sam Wilkeson, Jr., by warranty deed, reserving and excepting the disputed right-of-way property (the "right-of-way") as follows:

> Reserving and excepting, however, from the above described premises, a strip of land two hundred feet wide, extending through the same on the line of the railroad of the said Northern pacific Railroad Company or on the line of any of its branches to be used for a Right of Way or for other railroad purposes, in case the line of said railroad or any of its branches has been or shall be located on or over said described pieces or parcels of land and premises (being part of the same land granted to the party of the first part by the United States of America under and by virtue of the said Act of Congress approved the 2nd day of July, 1864, and included in the aforesaid mortgage).

Subsequent conveyances of the original parcel passed the property from Hiram Sabin to John and Opal Winkelman on May 10, 1946. The warranty deed from Sabin to Winkelman contained the following language of exception relating to the right-of-way:

> EXCEPT, the right of way of the Northern Pacific Railway Company . . . and except tracks appropriated by Northern Pacific Railway Company in Cause No. 74807 . . .

Burlington Northern Railroad Company acquired Northern Pacific's interest in the right-of-way as a successor in interest. On December 7, 1984, the Interstate Commerce Commission authorized the abandonment of the right-of-way, which was then abandoned on February 15, 1985 by Burlington Northern. The abandonment was conducted pursuant to 43 U.S.C. § 912, which provides in pertinent part:

> Whenever public lands . . . have been . . . granted to any railroad company for use as a right of way . . . , and use and occupancy of said lands for such purposes has ceased . . . by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all . . . interest . . . in said lands shall . . . be transferred to and vested in any person . . . to whom . . . title of the United States may have been granted, conveying . . . the whole of the legal subdivision or subdivisions traversed or occupied by such railroad . . . without the necessity of any other or further conveyance or assurance of any kind . . . whatsoever . . .

Although 43 U.S.C. § 912 states that the abandonment must be declared by an Act of Congress, Congress has delegated the authority to regulate the abandonment of rail lines to the Interstate Commerce Commission, which now has exclusive authority to authorize abandonments. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*,

450 U.S. 311, 321-23, 67 L. Ed. 2d 258, 101 S. Ct. 1124 (1981). When Burlington Northern abandoned the right-of-way on February 15, 1985, Opal Winkelman, individually, and Opal Winkelman, Joan Nelson, and Mary Eytinge, as Trustees of the John C. Winkelman Family Trust (Winkelman), held fee title to the "legal subdivision or subdivisions traversed or occupied by" the right-of-way. Thus, at the time of abandonment, title to the right-of-way vested in Winkelman. However, Winkelman was not aware of the abandonment or the vesting of title.

On April 23, 1987, Winkelman sold approximately 60 acres of the Property to Ski Park Farms, Inc. for $143,500. On July 24, 1987, Harris entered into a real estate purchase and sale agreement with Winkelman for the purchase of property located within two government quarter sections, parts of which were bisected by the railroad right-of-way, resulting in three small parcels bounded by either roads, a creek, section lines or the right-of-way. The total sale price was $7,000. Harris, who drafted the legal description, included the following language: "excepting the Northern Pacific railroad right-of-way easement."

The sale closed on October 29, 1987. Prior to closing of the Harris purchase, the preliminary commitment for title insurance and all other closing documents, including the deed, were reviewed both by Harris and by an attorney on her behalf. The title policy and the deed included the following exception: "excepting therefrom right of way of the Burlington Northern (Formerly Northern Pacific) Railway Company." Then, on February 24, 1988, Winkelman, by quit claim deed, conveyed to Ski Park

Farms, Inc. the fee interest in the abandoned right-of-way property in close proximity to Ski Park's property.

In reviewing a summary judgment, this court engages in the same review as the trial court. *Del Guzzi Construction Co., Inc., v. Global Northwest Ltd., Inc.*, 105 Wn.2d 878, 719 P.2d 120 (1986). Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c); *Hontz v. State*, 105 Wn.2d 302, 714 P.2d 1176 (1986).

The issue here is construction of the Winkelman to Harris deed. The construction of a deed generally is a matter of law for the court. *Donald v. Vancouver*, 43 Wn. App. 880, 719 P.2d 966 (1986). In construing a deed, the intent of the parties controls; particular attention is paid to the intent of the grantor when giving meaning to the entire language of the deed. *Carr v. Burlington Northern, Inc.*, 23 Wn. App. 386, 597 P.2d 409 (1979). The intent must be ascertained from reading the deed as a whole, and the words are to be given their ordinary meaning. *McKillop v. Crown Zellerbach, Inc.*, 46 Wn. App. 870, 873, 733 P.2d 559, *review denied*, 108 Wn.2d 1015 (1987).

Harris's primary position is that the term "right-of-way" is per se ambiguous, and that parol evidence must be employed to resolve the ambiguity. *Zobrist v. Culp*, 95 Wn. 2d 556, 627 P.2d 1308 (1981). She also invokes the rule of deed construction that ambiguities must be interpreted most favorably to the grantee and most strictly against the grantor. *Carr v. Burlington Northern, supra.*

However, that rule of construction is not helpful here because it was Harris, the grantee, who prepared the purchase and sale agreement containing the reference to the exception of the " right-of-way easement." The ambiguity in the term "right-of-way" must be interpreted equally favorably and detrimentally against both Harris and Winkelman.

Harris argues that the exception in the deed applied only to a railroad easement over the property described, and that since the easement was abandoned, she then owned the fee interest in the property. She relies on the language in the purchase and sale agreement, which excepted "the Northern Pacific railroad right-of-way easement." Her reliance on the purchase and sale agreement is misplaced. Provisions of a real estate contract and sale agreement and all prior negotiations merge into the deed delivered and accepted in fulfillment of the earlier contact. *Black v. Evergreen Land Developers, Inc.*, 75 Wn.2d 241, 248, 450 P.2d 470 (1969).

An exception in a deed is a clause that withdraws from its operation some part of the thing granted and which otherwise has passed to the grantee under the general description. *Studebaker v. Beek*, 83 Wash. 260, 265, 145 P. 225 (1915). The ambiguity that must be solved is what Winkelman intended to except from the sale to Harris. The term "right-of-way" has indeed been used to denote a number of different interests in property. In the context of right-of-way created by the 1864 Land Grant Act and subsequent similar grants, the interest received by railroad companies before 1871 were referred to as a "limited fee, with right of reverter", while those received after 1871 were referred to as a "exclusive use easement." *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330,

1332-35 (9th Cir. 1990). However, the confusion as to the meaning of the term "right-of-way" need not be resolved because at the time of the conveyance to Harris, the right-of-way no longer existed.

The deed stated Winkelman's intent to except from the sale to Harris the "right-of-way of the Burlington Northern. . . . " We conclude that Winkelman intended to reserve whatever interest in the right-of-way they owned. Although not known to Winkelman, the right-of-way had been abandoned and Winkelman now owned all interest in the property where the right-of-way had previously existed. If the conveyance to Harris was intended to transfer the property where the right-of-way had existed, the exception language was superfluous.

We are satisfied that the Winkelman intended to reserve the property where the abandoned right-of-way traversed the quarter sections Winkelman conveyed to Harris. The later conveyance from Winkelman to Ski Park vested title to the abandoned right-of way property in Ski Park. The court erred in quieting title to the abandoned right-of-way property in Harris.

Reversed and remanded with instructions to enter summary judgment quieting title in Ski Park Farms, Inc. to that disputed portion of the abandoned right-of-way property described in Winkelman's quit claim deed to Ski Park Farms, Inc.

/s/ Petrich J.

WE CONCUR:

/s/ Worswick, C.J.

/s/ Reed, Edward P.

APPENDIX F

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

MARY HARRIS, Plaintiff, vs. SKI PARK FARMS, INC, et al, Defendant.	NO. 87-2-01090-8 FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Sept. 7, 1988)

THIS MATTER having come on regularly for hearing before the undersigned judge upon the respective motions of Plaintiff and Defendant for Summary Judgment; the Plaintiff appearing and being represented by LOREN D. COMBS, of LOREN D. COMBS, INC., P.S. and the Defendants appearing and being represented by JAMES GAUTHIER of the law offices of JAMES SWIGART; and the Court having reviewed the files and records herein, having heard the arguments of counsel, having determined that there are no material issues of fact in dispute and deeming itself otherwise fully advised in the premises, the Court makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1.1 That the Plaintiff, Mary Harris has been a resident of Pierce County, Washington at all time [sic] relevant hereto;

1.2 That the Defendant, Ski Park Farms, Inc. is a Washington Corporation owning real property and doing business in Pierce County, Washington.

1.3 That the real property that is the subject of this matter is located in Pierce County, Washington.

1.4 That Opal V. Winkelman and the Winkelman Family Trust were the record owners of the real property that is the subject of this action at the time of the conveyance of the property to Plaintiff, Mary Harris, on October 29, 1987.

1.5 That the Pierce County Superior Court has jurisdiction over the subject matter and parties to this action and venue is properly laid in this Court;

1.6 That on or about July 24, 1987 the Plaintiff, Mary Harris, and the parties common Grantor Opal Winkelman, Mary Eytinge and Joan Nelson entered into an Earnest Money Purchase and Sale Agreement for the Grantors to sell and the Plaintiff to purchase real property in Pierce County, Washington;

1.7 That the Earnest Money Purchase and Sale Agreement was supported by consideration, was unambiguous and was a binding contract between the parties;

1.8 That the legal description of the property contemplated by the parties within the terms of the sale attached to and made part of the Earnest Money Purchase and Sale Agreement described the property as follows:

> "All of that portion of tax parcel number 5-19-27-1-003 lying between State Route 162 (Pioneer Way) and the South Prairie-Carbon

River Road excepting the Northern Pacific Railroad right-of-way easement.

All of that portion of tax parcel 5-19-26-2-007 lying between the South Prairie Creek and the South Prairie-Carbon River Road excepting the Northern Pacific Railroad right-of-way easement."

1.9 That the above quoted legal description was acknowledged by the grantor Opal Winkelman;

1.10 That the Plaintiff's intent to purchase the property in dispute subject only to an easement that may or may not have existed at the time of the conveyance was made clear to the Grantors.

1.11 That the wording of the legal description excepting an easement was significant in that it disclosed the Plaintiff's intent to acquire the underlying fee to the property subject to whatever rights of use the railroad had;

1.12 That the Grantors obtained a title report covering the property being conveyed. The title report disclosed that the Plaintiff had commenced a Quiet Title action under Pierce County Cause number 87-2-01090-8 and that the Quiet Title action included the property that is the subject of this dispute.

1.13 That the legal description attached to and made a part of the Warranty Deed from Winkelman, et al. to the Plaintiff was prepared by and at the direction of Winkelman, et al.;

1.14 That the language of exception of a right-of-way appearing in the Warranty Deed was ambiguous

with respect to the nature of the property interests excepted from the terms of the deed;

1.15 That Ms. Winkelman, her agents and associates and the family trust all understood from the Earnest Money Agreement that only an easement for a railroad right-of-way was to be excepted from the terms of the conveyance.

1.16 That there was no [intended /s/ EAM] modification of the terms of the Earnest Money Agreement with respect to the intent of the parties to only except an easement;

1.17 That the conveyance from the Grantors to the Plaintiff was ~~deficient~~ [ambiguous /s/ EAM] in that it failed to [clearly /s/ EAM] fulfill the understanding of the parties as evidenced by the Earnest Money Purchase and Sale Agreement;

1.18 That the Grantors and their agents never disclosed any intent to except the underlying fee to that portion of the disputed property formerly subject to a railroad right-of-way.

1.19 That there was a ~~scrivener's error~~ [ambiguity /s/ EAM] made in the legal description of the Statutory Warranty Deed in failing to ~~properly~~ [clearly /s/ EAM] identify the exception of an easement only [and thus the document was ambiguous /s/ EAM].

1.20 That the Warranty Deed from the Grantors to the Plaintiff should be ~~reformed~~ [interpreted /s/ EAM] to include the conveyance of the underlying fee of certain land formerly subject to a railroad right-of-way; [easement, or what was thought to be an easement /s/ EAM].

1.21 That on or about February 24, 1988 the Defendants obtained a Quit Claim Deed from the Grantors Winkelman, et al.;

1.22 That the conveyance of February 24, 1988, was made without warranties and that the Defendant, Ski Park Farms, Inc. knew [or are charged with knowledge /s/ EAM] that the Plaintiff was claiming title to a portion of the property described in the Quit Claim Deed at the time that they accepted the deed.

1.23 That the Court relied upon the representations of both counsel that all material facts in this case were before it prior to resolving the matter at Summary Judgment.

II. CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

2.1. This Court has personal and subject matter jurisdiction over the parties and venue is properly laid in this Court;

2.2. The Earnest Money Purchase and Sale Agreement was a valid contract entered into between the Plaintiff Mary E. Harris and the Grantors Winkelman, et al.;

2.3. The legal description attached to and made part of the Earnest Money Purchase and Sale Agreement only excepted an easement in favor of Burlington Northern Railroad from the terms of the conveyance;

2.4. The Grantors had fee simple title to all of the property described as that portion of the West half of the

Northwest quarter of Section 26, Township 19 North Range 5 East Willamette Meridian Pierce County Washington lying Southeasterly of South Prairie Creek and Northwesterly of South Prairie-Carbon River County Road; also that portion of the Southeast quarter of the Northeast quarter of Section 27 Township 19 North Range 5 East of Willamette Meridian Pierce County, Washington which lies Southeasternly of the Southeasterly margin of State Route 162 (Pioneer Way) and Northwesterly of South Prairie-Carbon River County Road.

2.5 The Grantor had actual [or constructive /s/ EAM] knowledge of the Plaintiff's ~~intent to acquire~~ [claim to /s/ EAM] the underlying fee to the property described in paragraph 2.4 above subject only to an easement of the railroad by the language of the Purchase and Sale Earnest Money Agreement and by the disclosure in the title report of the pendency of a Quiet Title action that included the subject property.

2.6. The intent of the parties as evidenced by the Earnest Money Purchase and Sale Agreement dated July 24, 1987, was to convey fee title to the above described property subject to whatever rights the Burlington Northern Railroad might still have to use a portion of the property. The Warranty Deed from Winkelman et al. to the Plaintiff Mary Harris is [ambiguous and is /s/ EAM] hereby ~~reformed~~ [construed /s/ EAM] to convey fee title to all of the land described in Paragraph 4 above. That title to all of the land described in Paragraph 4 above including whatever portion of that land was formerly subject to a railroad right-of-way is hereby quieted in the name of Mary E. Harris, Plaintiff herein.

2.7. The conveyance by Quit Claim Deed of February 24, 1988, from the Grantors Winkelman, et al, to the Defendants Ski Park Farms, Inc., was made without warranties of any kind. That the Defendant Ski Park Farms, Inc., is charged with knowledge that the Plaintiff Mary Harris was claiming title to a portion of the property described in the Quit Claim Deed of February 24, 1988;

2.8. Any Finding of Fact herein deemed to be a Conclusion of Law, is hereby incorporated into these Conclusions of Law, any Conclusion of Law deemed to be a Finding of Fact is hereby incorporated into the Findings of Fact.

DONE IN OPEN COURT this 7 day of Sept., 1988.

/s/ E. Albert Morrison
E. Albert Morrison, Judge

Presented by:

LOREN D. COMBS, INC., P.S.

By: /s/ Loren D. Combs
LOREN D. COMBS
Attorney for Plaintiff

Approved as to Form and Contents,
Notice of Presentation Waived:

LAW OFFICES OF JAMES SWIGART

By: /s/ James A. Gauthier
JAMES A. GAUTHIER
Attorney for Defendants.

APPENDIX G

IN THE SUPERIOR COURT FOR THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MARY E. HARRIS, a single person, et al., Plaintiffs, vs. BURLINGTON NORTHERN, et al., Defendants.	No. 87-2-01090-8 DEFAULT JUDGMENT (Filed Dec. 31, 1987)

THIS MATTER HAVING come on for hearing on this date and the Plaintiffs having previously obtained an Order declaring the Defendants known as All Unknown Claimants Who Now or Hereafter Claim an Interest in the Real Property That is the Subject of this Action ("All Unknown Claimants") to be in default herein; and the matter having been otherwise settled by agreement of the parties as to all named Defendants; and the Court having considered the files and records herein; now, therefore, it is hereby

ORDERED ADJUDGED AND DECREED that the following individually named plaintiffs shall have judgment against Defendants "ALL UNKNOWN CLAIMANTS" quieting title to those portions of former railroad right-of-way, which are the subject of this action, according to the terms of the plaintiffs Complaint for Declaratory Relief and more particularly set forth in legal descriptions

appended as exhibits hereto and Quieted to the Plaintiffs as follows:

Mary E. Harris- legal on exhibit 1
John C. Gratzer- legal on exhibit 2
Henry H. and Edith Rice- legal on exhibit 3
Williams Land Company >
Elmer G and Sharon N. Williams> legal on exhibit 4
Hans R. and Ruth Wilhelm- legal on exhibit 5
Marvin C. and Leta E. Anderson- legal on exhibit 6
James G. and Margaret W. Caviezel- legal on exhibit 7
Fred E. Hueneka>
Rose Hueneka > legal on exhibit 8
George E. and Ruth L. Langlois- legal on exhibit 9
Malcolm H and Emily E. Wilkinson- legal on exhibit 10
Harlan T. and Emma Ford- legal on exhibit 11
Arthur W. Miskar- legal on exhibit 12
Virgil and Leona Baker >
Mountain View Farms, Inc.> legal on exhibit 13
Vance and Patricia Baker- legal on exhibit 14
Guy A. and Evelyn West- legal on exhibit 15
Joe D. and Susan Vines>
Rebecca Vines > legal on exhibit 16
Elvera Honsowetz >
Dennis F. and Terri Larson> legal on exhibit 17
Leland K. and Patty S. Meitzler >
Stephen K. & Shirley E. Meitzler> legal on exhibit 18
August C. and Maureen Soler- legal on exhibit 19
Howard H. and Elizabeth J. Harman- legal on exhibit 20
Owen H. Dickson- legal on exhibit 21

Robert W. and Beverly Lindberg- legal on exhibit 22
Delmas F. and Catherine E. Zirkle- legal on exhibit 23
Sanford Zirkle- legal on exhibit 24
Steve and Joyce Albert- legal on exhibit 25
Ray L. and Donna J. Hart >
Dorothy & Clarence R. Jacobson> legal on exhibit 26
Roscoe L. & Dorothy L. Wissinger- legal on exhibit 27
John W. and Mary E. Weatherly- legal on exhibit 28
Ray H. and Lois B. Tinnon- legal on exhibit 29
Don and Lois Rolston- legal on exhibit 30
James and Nancy Graham- legal on exhibit 31
Opal L. Bloomberg- legal on exhibit 32
Erwin H. Knaack- legal on exhibit 33
Glen W. and Mary L. Reedy- legal on exhibit 34
Malcolm K. and Josephine Froud- legal on exhibit 35
Sherman and Evona Peterson- legal on exhibit 36
Douglas J. & Barbara Ann Peterson- legal on exhibit 37
Neil R. and Ann V. Husebye- legal on exhibit 38
William Paine and Linda Brown- legal on exhibit 39
Russell A. and Sherry L. Jones- legal on exhibit 40

Done in Open Court this 31 day of Dec, 1987.

/s/ E. Albert Morrison
Judge/Court Commissioner

Presented by:

LOREN D. COMBS, INC., P.S.

/s/ Donald A. Kellman
Donald A. Kellman
Attorney for Plaintiffs

APPENDIX H

A.L.T.A. COMMITMENT
SCHEDULE B
(Continued)

Title Insurance Policy
for Mary E. Harris
Land Purchase: Oct. 29, 1987 Our No. A-49090
Grantor: Opal V. Winkelman Your No.

→ 4. PENDING ACTION IN PIERCE COUNTY SUPERIOR COURT.

CAUSE NUMBER: 87-2-01090-8
FILED: FEBRUARY 20, 1987
BEING AN
ACTION FOR: DECLARATORY RELIEF AND QUIET TITLE MARY E. HARRIS (CITIZENS AGAINST THE TRAIL)
DEFENDANT: U.S.A., PIERCE COUNTY, BURLINGTON NORTHERN RAILROAD COMPANY
ATTORNEY FOR
THE PLAINTIFF: DONAL A. KELLMEN

→ A LIS PENDENS OF SAID ACTION WAS RECORDED ON SEPTEMBER 11, 1987 UNDER RECORDING NUMBER 8709110334.

→ SAID LIS PENDENS IS A RE-RECORDING OF LIS PENDENS RECORDED UNDER RECORDING NUMBER 8702240436.

5. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

GRANTEE: THE ORTING LIGHT AND WATER COMPANY, A CORPORATION

PURPOSE: REPAIRING, RECONSTRUCTING OR OTHERWISE MAKING USE OF PIPE LINE SO OPERATED IN CONNECTION WITH SAID WATER SYSTEM, AND FOR ALL OF THE NECESSARY RIGHTS AND PRIVILEGES THAT ARE REQUIRED IN THE OPERATION OF SAID WATER PLANT AND SYSTEM.

AREA AFFECTED: PARCEL B

RECORDED: SEPTEMBER 04, 1925

RECORDING NUMBER: 769155

6. ANY QUESTION THAT MAY ARISE DUE TO SHIFTING AND CHANGING IN THE COURSE OF THE SOUTH PRAIRIE CREEK.

7. ANY PROHIBITION OF OR LIMITATION OF USE, OCCUPANCY OR IMPROVEMENT OF THE LANDS RESULTING FROM THE RIGHTS OF THE PUBLIC OR RIPARIAN OWNERS TO USE ANY PORTION WHICH IS NOW OR HAS BEEN FORMERLY COVERED BY WATER.

→8. RESERVATIONS AND EXCEPTIONS CONTAINED IN DEED FROM NORTHERN PACIFIC RAILROAD COMPANY: RESERVING AND EXCEPTING FROM SAID LANDS SO MUCH OR SUCH PORTIONS THEREOF AS ARE OR MAY BE MINERAL LANDS OR CONTAIN COAL OR IRON, AND ALSO THE USE AND THE RIGHT AND TITLE TO THE USE OF SUCH SURFACE GROUND AS MAY BE NECESSARY FOR MINING OPERATIONS AND THE RIGHT OF ACCESS TO SUCH RESERVED AND EXCEPTED MINERAL LANDS, INCLUDING LANDS CONTAINING COAL OR IRON, FOR THE PURPOSE

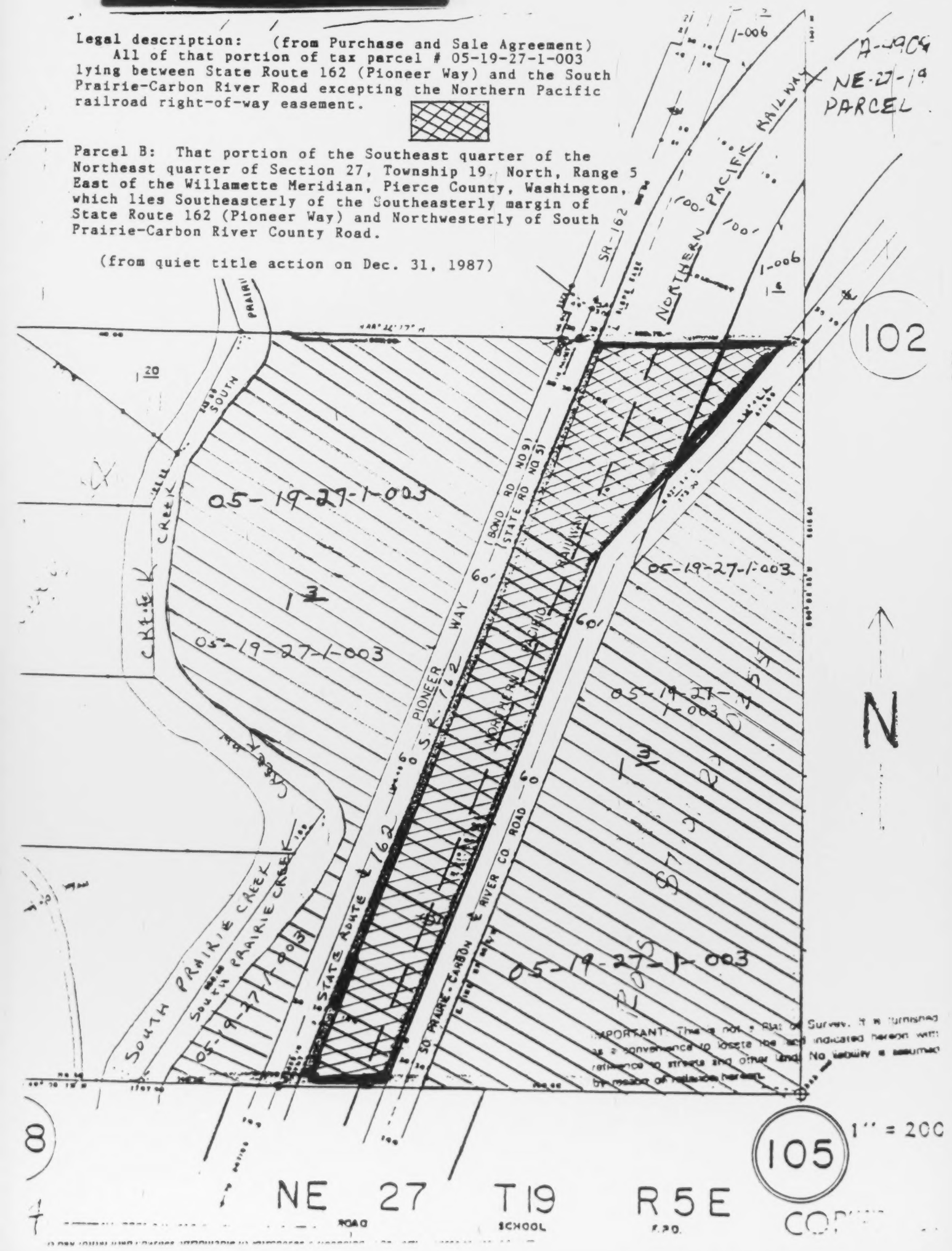
OF EXPLORING, DEVELOPING AND WORKING THE SAME.

RECORDED IN BOOK 27 OF DEEDS AT PAGE 97.

9. UNRECORDED LEASEHOLDS, IF ANY, RIGHTS OF VENDORS AND HOLDERS OF SECURITY INTERESTS ON PERSONAL PROPERTY INSTALLED UPON SAID PROPERTY AND RIGHTS OF TENANTS TO REMOVE TRADE FIXTURES AT THE EXPIRATION OF THE TERM.

10. RIGHT, TITLE AND INTEREST OF ROBERT W. WALLIN AND CAROLINE J. WALLIN AS DISCLOSED BY INSTRUMENTS RECORDED UNDER RECORDING NOS. 1915270, 1921551 AND 29070694.

BEST AVAILABLE COPY



H-4

(LOGO) LEGAL
NOTICES

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR THE COUNTY OF PIERCE

MARY E. HARRIS, et al., Plaintiff, vs.
ALL PERSONS UNKNOWN WHO NOW OR HERAFTER [sic] CLAIM AN INTEREST IN THE REAL PROPERTY THAT IS THE SUBJECT OF THIS ACTION, et al., Defendants.
NO. 87-201090-81
SUMMONS ON COMPLAINT FOR DECLARATORY RELIEF AS TO QUIET TITLE (FOR PUBLICATION)

The State of Washington to the said unknown person or parties claiming any right, title, estate, lien or any interest in the real estate described in the Complaint herein:

You are hereby summoned to appear within 60 days after the date of the first publication of this Summons, to wit, within 60 days after the 3rd day of September, 1987 and defend the above-entitled action in the above-entitled Court and answer the Complaint of the Plaintiffs herein and serve a copy of your answer upon the undersigned attorneys for said Plaintiffs, at their office below stated; and in case of your failure so to do, judgment will be rendered against you according to the demand of the Complaint, which has been filed with the Clerk of said Court.

The object of this action is to quiet title to certain portions of the former Railroad rights-of-way which have been abandoned by Burlington Northern Railroad. Claims are made to portions of the former rights-of-way

within the following sections in Pierce County, Washington:

Section	Township	Range	Section	Township	Range
13	19 N	4 E	27	19 N	5 E
24	19 N	4 E	30	19 N	5 E
5	18 N	5 E	32	19 N	5 E
8	18 N	5 E	33	19 N	5 E
17	18 N	5 E	34	19 N	5 E
20	18 N	5 E	8	19 N	6 E
13	19 N	5 E	9	19 N	6 E
19	19 N	5 E	17	19 N	6 E
23	19 N	5 E	18	19 N	6 E
26	19 N	5 E	21	19 N	6 E
			28	19 N	6 E

If you have or claim an interest in the former Railroad right-of-way within the above-named section you must respond within the time limits stated above.

KIRSHENBAUM & COMBS
By: Donald A. Kellman
Attorney for Plaintiff
450 Shattuck Avenue So.
Suite 200
Renton, WA 98055
(206) 235-4800

IN THE SUPERIOR COURT FOR THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MARY E. HARRIS, et al., Plaintiffs, vs. BURLINGTON NORTHERN RAILROAD COMPANY, et al., Defendants.	No. 87-2-01090-8 DISCLAIMER OF INTEREST (Filed Dec. 31, 1987)

1. Defendants Burlington Northern Railroad Company and Meridian Oil, Inc. (hereinafter Defendants), hereby disclaim all right, title and interest, if any, in and to the real property described in Exhibit A, attached hereto and made a part hereof.

2. Defendants, as their interest may appear, reassert and maintain all right, title and interest in and to any real property the subject of this action that is not described in Exhibit A and Plaintiffs do not contest such right, title and interest in Defendants or Defendants' mortgage trustees, subject, however, to the understandings contained herein.

3. To settle the dispute between Plaintiffs and Defendants, and for and in consideration of the waiver of claims referred to in paragraph 6 of the Stipulation of the Parties Upon Order of Dismissal, Defendant Burlington Northern Railroad Company shall, within a reasonable time after the entry of the Order of Dismissal, cause quitclaim deeds to be issued to the Plaintiffs Caviezel,

Dickson, Husebye, and Bloomberg, respectively, conveying to them the real property as their interest shall appear described in Exhibit B, attached hereto and made a part hereof, excepting and reserving all minerals and mineral rights heretofore reserved by Defendants or their predecessors in prior conveyances, as generally described in Defendant's Answers filed in this action. Defendant Burlington Northern Railroad Company shall, promptly after said conveyances, initiate procedures for the partial release of mortgage liens, if any, from the properties conveyed and deliver to Plaintiffs' counsel such partial releases in recordable form (or evidence thereof) upon their execution and delivery by the trustees.

Dated this 28th day of December, 1987.

Respectfully submitted,

GLACIER PARK COMPANY

/s/ Robert E. Walkley
Robert E. Walkley
Attorney for Defendants
Burlington Northern Railroad
Company and Meridian Oil,
Inc.

CONTENTS APPROVED:

LOREN D. COMBS, INC., P.S.

By /s/ Donald A. Kellman
Donald A. Kellman
Attorney for Plaintiffs

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY

MARY HARRIS, et al., Plaintiffs, vs. SKI PARK FARMS, INC. Defendants	NO. 87-2-01090-8 DECLARATION OF MARY E. HARRIS (Filed July 7, 1988)

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

The undersigned declarant, Mary E. Harris, declares under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

1. That on July 24, 1987, I signed a Real Estate Contract/ Earnest Money Agreement in the real estate office of Clark McGowan, the listing agent for Opal Winkleman, et al.

2. That prior to the above date I had filed an action seeking an order quieting title to real property formerly subject to a right-of-way of the Burlington Northern Railroad.

3. That it was my intention to acquire the ownership interest of the property formerly subject to a railroad right-of-way in the transaction with Winkleman et al.

4. The land that I acquired from Winkleman et al. included the easement area of the railroad. Without the former railroad right-of-way as a connecting link the adjoining land would have been fragmented, isolated or landlocked.

5. It was my intention to quiet title to the land formerly subject to a railroad right-of-way and unify the property involved.

6. That it was my understanding that I was acquiring the underlying fee or any reversionary interest that Winkleman had in the former right-of-way when I made the purchase from her.

7. The Earnest Money Agreement clearly defines the land as that portion of tax parcel number 5-19-27-1-003 lying between State Route 162 and the South Prairie/ Carbon River Road except for the easement of the Burlington Northern Railroad.

8. That during the purchase transaction, I had no contact with Mrs. Winkleman or her son-in-law, Jonathan Eytinge. When I initially contacted them about buying some land, Mrs. Winkleman told me that her son-in-law, Mr. Eytinge, was handling everything. She gave me his phone number. I called him and was told that Clark McGowan was the real estate agent handling the transaction for them and that they did not want to get involved in the business of the sale.

9. After I signed the Earnest Money Agreement, I gave my attorney the preliminary legal description of the property and told him to include it in the Lis Pendens for the Quiet Title action which was in progress.

10. The seller, Mrs. Winkleman, ordered and paid for a title insurance report and policy.

11. The final exceptions and encumbrances were reviewed by both buyer and seller.

12. Clark McGowan reviewed the title report as the listing agent for the seller.

13. No objection to the Lis Pendens was ever voiced to me by any party involved in the real estate transaction.

14. There was conversation about the abandoned right-of-way between myself and Mr. McGowan. I gave him a copy of a Tacoma News Tribune article of October 5, 1986, with a long story about the former right-of-way and my petition drive to save it from being turned into a public trail.This [sic] article is currently in his real estate file along with records of my sale transaction. I recall that Mr.McGowan [sic] on two occasions, before closing, asked me whether the railroad had disclaimed its interest in its right-of-way on the property.

15. The Quit Claim Deed from Winkleman to Ski Park Farms purports to convey the grantor's interest in several portions of land formerly subject to railroad rights-of-way. The monetary consideration for the Quit Claim deed was $250.00. The disputed area covers about one-third of this area. The grantors attempted to convey their interest in the disputed property for approximately $83.33.

16. In addition to slandering the title to my deed for the land formerly subject to a right-of-way, the grantors have slandered the potential title and reversionary interest in the former railroad right-of-way of three other land-holders to the south and west by the Quit Claim deed.

17. No attorney retained by me has ever indicated that the exception for the right-of-way easement could ever be interpreted as withholding the reversionary interest.

18. Although the right-of-way had been abandoned, it had not been officially vacated through the Quiet Title process. The railroad had not yet given a disclaimer of interest on the date of the sale.

19. Winkleman et al., therefore had to refer to the right-of-way as an exception on the deed to me.

20. I now have the right to the disputed property based upon the Quiet Title proceeding and the disclaimer of interest filed by Burlington Northern.

DATED this 5th day of July, 1988, at Tacoma, Washington.

/s/ Mary E. Harris
Mary E. Harris

(SEAL)

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

MARY E. HARRIS, Petitioner, v. SKI PARK FARMS, INC., et al., Respondent.	NO. 5860-4 Court of Appeals No. 12321-5 Superior Court Cause No. 87-2-01090-8 AFFIDAVIT OF DONALD A. KELLMAN

STATE OF WASHINGTON)
) ss.
County of Spokane)

DONALD A. KELLMAN, being first duly sworn upon oath deposes and says:

1. That I am an attorney in the State of Washington. I make this Affidavit based on personal knowledge of the facts contained herein.

2. I was formerly one of the attorneys representing the plaintiff/petitioner, Mary E. Harris. I represented Ms. Harris in a quiet title action in Pierce County Superior Court. I took part in the preparation and argument of a motion for summary judgment that engendered the case at bar.

3. I have read the opinion of the Court dated February 11, 1993. I noted in the opinion several references to an unsigned Declaration of Mary E. Harris. The purpose

of this Affidavit is to provide the Court with facts concerning the filing of said Declaration.

4. With input from Ms. Harris, I prepared the Declaration in question and reviewed its contents with her over the telephone. In order to meet filing deadlines, the unsigned Declaration was filed with a notation that the original would be filed in Court at the hearing. On the day of the hearing, Ms. Harris was in Court and signed the original Declaration. This document was then filed in open court and is part of the Superior Court's file. A true and correct copy of the signed Declaration of Mary Harris, filed in Pierce County Superior Court, is attached hereto and incorporated herein by this reference.

5. The Court's Opinion makes reference to the fact that Ms. Harris was represented by counsel at the time of her negotiation and purchase of the disputed property from Winkleman. Neither I nor my former firm represented Ms. Harris in that purchase and sale transaction. Our representation related to a quiet title action in which Ms. Harris was one of a large group of plaintiffs. Neither I nor my former firm was asked to nor did we review any of the purchase and sale documents prior to the closing of the sale.

Further your affiant sayeth naught.

/s/ Donald A. Kellman
DONALD A. KELLMAN

SUBSCRIBED AND SWORN to before me this 25th day of February, 1993.

/s/ Illegible

NOTARY PUBLIC in and for the
State of Washington residing at
Spokane
My Commission Expires: 3/1/94

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY

MARY HARRIS, et al., Plaintiffs, vs. U.S.A., et al., Defendants.	NO. 87-2-01090-8 DECLARATION OF JOHN BECKER (Filed July 21, 1988)

STATE OF WASHINGTON)
)
COUNTY OF THURSTON)

JOHN BECKER, declares:

1. That I am the individual who prepared the legal description of the property conveyed by Winkelman, et al., to Mary E. Harris recorded under auditors fee number 8711100338.

2. That this description was prepared in the course of my regular employment with Keyes and Associates at the request of Clark McGowan, agent for the seller Winkelman et al.

3. That there was no specific request or intention expressed by the seller to reserve a fee interest in the

portion of the property formerly subject to a railroad right-of-way and described in the deed under the heading *PARCEL B*.

4. That there was no inquiry or discussion undertaken, to my knowledge, as to the status of the Burlington Northern Railway Company's interest in the subject property at the time of the sale.

5. That I had no knowledge one way or the other as to whether the Burlington Northern Railway Company had abandoned its right-of-way interest in the subject property at the time of the sale from Winkelman to Harris.

6. That the use of the language "excepting therefrom right-of-way of the Burlington Northern (formerly Northern Pacific) Railway Company" in the legal description of *PARCEL B* in the deed of October 29, 1987, was a recognition of the fact Burlington Northern Railroad Company at one time or perhaps still had a right-of-way interest in the subject property. The language was not included for the purpose of excepting the fee interest from the terms of the sale.

7. Had I been instructed to prepare a legal description for the deed that reserved the fee interest in the property formerly subject to a railroad right-of-way I would not have used the language that appears in the deed.

8. The language in the deed of October 29, 1987, is consistent with the description of the subject property through the chain of title.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Executed in Yelm, Washington, on June 21, 1988.

/s/ John W. Becker
John Becker
(SEAL)

TRINITY LAND COMPANY
315 39th Ave SW Ste #8
Puyallup, WA 98373-3625

July 31, 1987

Mary Harris
P. O. Box 44384
Tacoma, WA 98444

Mary,

Enclosed please find a copy of the Earnest Money Agreement which has been signed by the seller, for your records.

The title report has been ordered and I will keep you informed on our progress.

Sincerely,

/s/ Clark R. McGowan
Clark R. McGowan

CRM/leg
Enclosure

LOGO TRINITY
LAND COMPANY
TIMBER • LAND • COMMERCIAL
BUS. 848-7700 848-9773 RES.

August 25, 1987

Mary Harris
P. O. Box 44384
Tacoma, WA 98444

Mary,

Please find enclosed a copy of the extension on closing initialed by the seller.

I am working with the engineer on obtaining the legal description for the title report.

Sincerely,

/s/ Clark R. McGowan
Clark R. McGowan

CRM/leg
Enclosure

ASSET RECOVERY, INC.
2324 NO. CRAWFORD ST.
PORTLAND, OREGON 97203

No 1370
TELE: (503) 289-7311
FAX: (503) 289-7337

Sold to:
Pierce County Washington
Dept of Parks, Recreation &
Comm. Services

Address:
9112 Lakewood Dr. SW
Tacoma, WA 98499

City, State, & Zip:
Attn: Mr. Jan Wolcott

Shipped to:

Customer Order #:
Terms:
F.O.B.:
Shipment Date:
Invoice Date: 1/26/88
Due Date:

Quantity	Description	Unit Price	Total
3	Bridges, Cascade Junction, Carbonado, Wilkeson		
7	Bridges, Cascade Junction, McMillin		
	Bridges along abandoned BN Rail Lines as detailed above		
	as per attached description		
	TOTAL		1.00

We've received payment – Thanks

APPENDIX I

Post Office Box 44384
Tacoma, Wash. 98444
March 17, 1986

Mr. Louis Gitomer, Deputy Director
Rail Division Office of Proceedings
Interstate Commerce Commision [sic]
12th and Constitution
Washington, D. C. 20423

Dear Mr. Gitomer,

Recently the Burlington Northern Railroad abandoned a stretch of railroad right of way between Orting, Washington and Cascade Junction in Pierce County of Washington State. I own a parcel of land which is bisected by this right of way about 2 miles north of Crocker, wash. [sic] I would like to acquire this portion of the abandoned right of way which cuts my land in two so I can put the two pieces back together again.

Would you please tell me how to do this, what office I should contact, their phone number or address?

I am enclosing a copy of the notice of intent to abandon, Docket No. AB-6(Sub-No. 226: Burlington Northern Railroad Co. abandonment Between Orting and Cascade Junction, Washington.

Please answer as soon as possible. Thank you.

Sincerely,

/s/ Mary E. Harris
Mary E. Harris
P.O. Box 44384
Tacoma, Wash. 98444

Interstate Commerce Commission
Washington, D.C. 20423

OFFICE OF PROCEEDINGS

March 26, 1986

Ms. Mary E. Harris
P.O. Box 44384
Tacoma, WA 98444

Dear Ms. Harris:

This responds to your recent letter inquiring into how you may purchase a portion of abandoned Burlington Northern Railroad Company (BN) right-of-way that bisects your land. This Commission authorized the abandonment in Docket No. AB-6 (Sub-No. 226), *Burlington Northern RR. Co. – Aband. – In Pierce Co., WA* (not printed), served December 7, 1984, and BN abandoned the line on February 15, 1985.

This Commission has no jurisdiction over the disposal of a railroad right of way once an abandonment has been consummated. You must deal directly with BN. Dave Williams is the official at BN's property management division who is responsible for Washington land sales. He may be reached at the following address: 3300 Continental Plaza, 777 Main Street, Fort Worth, TX 76102. His telephone number is (817) 878-1532.

As is often the case, BN, in its abandonment application, did not claim to have fee-simple title to all the land comprising its right-of-way. Because this Commission does not maintain land records, you may first want to check your county land records to determine if there is a

reversionary interest in the segment of right-of-way bisecting your property.

Sincerely,

/s/ Louis E. Gitomer
Louis E. Gitomer
Deputy Director
Rail Section

Post Office Box 44384
Tacoma, Washington
April 17, 1986

Mr. Dave Williams, Property Manager
Burlington Northern Railroad
3300 Continental Plaza
777 Main Street
Fort Worth, Texas 76102

Dear Mr. Williams,

Recently the Burlington Northern Railroad abandoned a stretch of railroad right of way between Orting, Washington and Cascade Junction in Pierce County of Washington State. I own a parcel of land which is bisected by this right of way about two miles north of Crocker, Washington. I would like to acquire this portion of the abandoned right of way which cuts my land in two so I can put the two pieces back together again.

Would you please tell me how to do this – what office I should contact?

I am enclosing a copy of the Notice of Intent to Abandon, Docket No. AB-6(Sub-No. 226: Burlington Northern Railroad Co. Abandonment between Orting and Cascade Junction, Washington.

I am enclosing a plat map of the area, a legal description of the land involved and a recent letter from Louis Gitomer of the ICC.

Please answer as soon as possible. Thank you.

Sincerely,

/s/ Mary E. Harris
Mary E. Harris
Post Office Box 44384
Tacoma, Washington 98444

LOGO BURLINGTON NORTHERN RAILROAD

3300 Continental Plaza
777 Main Street
Ft. Worth, Texas 76102

SALES and PROPERTY
MANAGEMENT DEPARTMENT

July 14, 1986

Ms. Mary E. Harris
P. O. Box 44384
Tacoma, WA 98444

Dear Ms. Harris:

This refers to your letter of April 17, 1986 and telephone call of July 11, 1986 regarding your purchase of Burlington Northern's right of way near Crocker, Washington on our Orting to Cascade Jct., Washington line.

We will hold your inquiry on file with others until we can make final decision on how the right of way will be sold.

We want to sell as much of the right of way as we can with one deed and are hopeful that a group can be formed to purchase the line. Our minimum fee for a deed and mortgage release is $2,000 which only covers our legal and paper costs.

Sincerely,

/s/ R. C. Flaherty
R. C. Flaherty
General Manager Real Estate

BN 7219 Orting-Cascade Jct., WA

cc: D. A. Cowles

Mary E. Harris
Post Office Box 44384
Tacoma, Washington 98444
July 28, 1986

R. C. Flaherty
General Manager – Real Estate
Burlington Northern Railroad
3300 Continental Plaza
777 Main Street
Fort Worth, Texas 76102

Dear Mr. Flaherty,

Thank you for your letter of July 14, 1986 regarding my inquiry about the abandoned Burlington Northern right of way near Crocker, Washington in Pierce County (BN 7219 Orting-Cascade Jct., Wa.).

As you are aware, I wrote a letter dated April 17, 1986 and also one dated June 14, 1986 concerning a portion of this right of way in which I am interested. In my letter of June 14, 1986 I made an offer of $2,000 cash for a portion of the strip adjacent and bisecting my land. In your letter of July 14 you mention that your minimum fee for a deed is $2,000. I would accept a quit claim deed for this strip and would have an attorney here draw up the appropriate paperwork as necessary, to save your firm time and money.

I am again enclosing a scale plat map and legal description of this portion of the right of way in which I am interested.

I understand according to your letter of July 14, 1986 that you want to sell as much of the right of way as you can with one deed. The part that I have designated is about all I can handle, pay taxes on and work as an integrated part of the land which I already have there.

I wish to negotiate this purchase with you now as I have been told by Mr. Loren Combs, an attorney from Renton, Washington, that your firm has already sold several other portions of the right of way near Buckley, Washington to adjacent property owners. He has acted as their agent in this purchase. Therefore, I wish to deal with you now,

directly, rather than to go through a third party which may be unnecessary.

In June, 1986 I spoke with Mr. Ken Brewer, Pierce County Property Manager, who told me that this particular part of the right of way, between Orting and Cascade Junction is NOT included in any proposed land swap between Pierce County and Burlington Northern. Mr. Ken Brewer's telephone number is 1-206-591-7112. Therefore, this possibility should not preclude your selling me this portion of the strip of right of way.

I will be hopefully waiting your reply.

Sincerely,

/s/ Mary E. Harris
Mary E. Harris

enclosures

Post Office Box 44384
Tacoma, Washington 98444
January 15, 1987

Pierce County Assessor
Pierce County Annex
2401 South 35th Street
Tacoma, Washington 98409

Dear Sir,

I am the owner of tax parcel #05-19-27-1-006.

The legal description is:

"That portion of the northeast quarter of the northeast quarter of Section 27, Township 19, north, Range 5

East, lying southeasterly of Orting-South Prairie Highway, except railroad right of way easement of record."

My parcel is bisected by a portion of the railroad right of way which was officially abandoned by the Burlington Northern Railroad company on February 15, 1985.

The recent Washington State Supreme Court decision, Wilbur H. Lawson et al v. the State of Washington et al of December 24, 1986 declared: "at common law, where a deed is construed to convey a right of way for railroad purposes only, upon abandonment by the railroad of the right of way, the land over which the right of way passes reverts to the reversionary interest holder free of easement".

On the advice of my attorney, I am thereby, requesting that you assign a tax parcel number to the segment of abandoned railroad right of way bisecting my parcel. In addition, send me a statement of property taxes now due on this portion, from the date of abandonment, as I wish to pay them immediately.

My parcel is outlined in yellow. The abandoned railroad right of way segment is outlined in red, for your convenience. I will be expecting your prompt reply.

Sincerely,

/s/ Mary E. Harris
Mary E. Harris

LOGO

PIERCE COUNTY

SHELDON K. COOK
Assessor-Treasurer

OFFICE OF THE ASSESSOR-TREASURER
2401 South 35th Street, Room 2
Tacoma, Washington 98409-7498

January 21, 1987

Mary E. Harris
P.O. Box 44384
Tacoma, WA 98409

Dear Ms. Harris:

Receipt of your letter dated January 15, 1987 is hereby acknowledged.

Because of the nature of your request and the controversy surrounding the Burlington Northern right of way, by copy of this letter, I am directing your request to the Pierce County Prosecuting Attorney's office for review.

When this office receives a determination upon the propriety of your request, we will notify you and perform accordingly in a timely manner.

Sincerely,

/s/ Sheldon K. Cook
Sheldon K. Cook

cc: Bob Dick, Deputy Prosecution Attorney
Jan Wolcott, Park & Recreation Director
Ken Brewer, Real Property Manager

JOHN W. LADENBURG
PIERCE COUNTY PROSECUTING ATTORNEY
946 County-City Building
Tacoma, Washington 98402-2171

Main Office: 591-7400
Felony Charging Unit: 591-7442
Family Support: 591-7444
Juvenile Division: 593-4471
Traffic/Misdemeanor: 591-7446
Victim/Witness Assistance: 591-7448

January 23, 1987

Mary E. Harris
P. O. Box 44384
Tacoma, Washington 98444

Dear Mrs. Harris:

Your letter of January 15, 1987 to the Pierce County Assessor has been referred to me for answer. As you know, the ownership of the former railroad property varies greatly depending upon many variables including ownership at the time of its acquisition, federal statutes, and other provisions of state law. In addition, Burlington Northern has not abandoned its claim of ownership to the property because of the varied manner in which segments thereof were acquired. Accordingly, Pierce County is not yet able to determined [sic] ownership of any portion of the right-of-way with sufficient certainty to determine the appropriate boundary lines for any segregation or to determine the taxpayer to whom statements should be sent.

The County is currently studying land titles and property boundaries of adjoining parcels, but the process

is expected to take some time. Your request to the Assessor-Treasurer will be retained in that office and when a determination can be made as to the basis for taxation of the former right-of-way and segregation, you will be notified.

Sincerely,

JOHN W. LADENBURG
Prosecuting Attorney

By: /s/ Robert P. Dick
Robert P. Dick,
Deputy Prosecuting
Attorney

RPD1:sab
cc: Kenneth Brewer, Real Property Manager
Jan Wolcott, Park and Recreation Director
Lloyd Nickel, Deputy Prosecuting Attorney

93-815

No. (2)

FILED
OCT 29 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

MARY E. HARRIS,

Petitioner,

v.

SKI PARK FARMS, INC.,

Respondent.

Petition For Writ Of Certiorari To The Washington State Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

BRADLEY A. MAXA
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QUESTION PRESENTED

Harris' presentation of the question in this case is misleading. She incorrectly suggests that the resolution of this case revolves around federal statutes and federal issues. In fact, this is a simple matter of deed construction. The Washington State Court of Appeals and the Washington State Supreme Court addressed a basic, state law question: whether the parties intended a statutory warranty deed reserving and excepting a right-of-way to withhold a fee interest or a mere easement.

As recognized by the Washington State Supreme Court, the true question is as follows:

> Whether Opal Winkelman, by reserving and excepting a right-of-way within a statutory warranty deed, withheld a fee interest rather than a mere easement when she conveyed property to Petitioner Harris.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE PETITION 7

1. The federal elements involved in this case are only tangentially related to the interpretation of the deed and do not raise important federal issues 8

2. The Washington State Supreme Court correctly interpreted the deed based on the particular language of the deed and the intent of the parties 10

3. The interpretation of the deed lacks the sufficient public interest or federal importance elements required to merit invoking the discretionary jurisdiction of this Court 12

CONCLUSION 14

APPENDIX A-1

Washington State Supreme Court Decision, February 11, 1993 ..... A-1

Brief of Respondent, Washington State Court of Appeals, April 24, 1989 ..... B-1

Reply Brief of Appellant, Washington State Court of Appeals, June 23, 1989 ..... C-1

TABLE OF CONTENTS – Continued

Page

Judgment on Mandate, September 3, 1993 ..... D-1

Map Illustrating Legal Description Included in Judgment on Mandate E-1

TABLE OF AUTHORITIES

Page

CASES

Roeder v. Burlington Northern, Inc., 105 Wash. 2d 269, 714 P.2d 1170 (1986) 10

STATUTES, REGULATIONS, CONSTITUTIONAL PROVISIONS

13 Stat. 358 (July 2, 1864) 2

42 Stat. 414 2

U.S.C. Title 43, Sec. 912 ..... 2, 9, 10

Thirteenth Amendment to the United States Constitution, Section 1 8

Fourteenth Amendment to the United States Constitution, Section 1 8

Land Grant Act of 1864, 13 Stat. 365 ..... 3, 9

No. _____

In The

Supreme Court of the United States

October Term, 1993

MARY E. HARRIS,

Petitioner,

v.

SKI PARK FARMS, INC.,

Respondent.

Petition For Writ Of Certiorari
To The Washington State Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ski Park Farms, Inc. respectfully requests that this Court deny Harris' petition for writ of certiorari.

OPINIONS BELOW

Early in this case, both the Respondent and the Petitioner moved the Superior Court of the State of Washington in the County of Pierce for summary judgment on the merits. The Superior Court granted summary judgment to Harris. On appeal, the Court of Appeals of the State of Washington, Division II, reversed the Superior Court and directed that summary judgment be entered in favor of

the Respondent. Harris made a motion for reconsideration, but the court of appeals merely amended its opinion while reaffirming its decision. The Supreme Court of the State of Washington unanimously affirmed the decision of the state court of appeals. *See App. A.* The Washington State Supreme Court denied Harris' motion for reconsideration. A Judgment on Mandate was filed on June 10, 1993.

JURISDICTION

Harris correctly cites 28 U.S.C. § 1257(a) as the authority on which this Court ***could*** invoke its discretionary jurisdiction. However, Harris' misguided assertion that property rights vest pursuant to 42 Stat. 414, U.S.C. Title 43, Sec. 912 and 13 Stat. 358, stands as a thinly-veiled effort to create a federal issue out of a simple deed construction matter.

Petitioner has also misplaced relevant federal statutes under the heading of jurisdiction.

STATUTORY PROVISIONS INVOLVED

While Harris correctly cites the federal statute providing for the disposition of abandoned portions of rights of way granted to railroad companies, she inaccurately cites the authority of the Interstate Commerce Commission by including the currently repealed subsection (c): repealed by PUB.L. 96-448, Title IV, § 402(a)(2), Oct. 14,

1980, 94 Stat. 1941. Additionally, Harris neglected to include the Land Grant Act of 1864, 13 Stat. 365.

More fundamentally, however, these federal statutes cited above are only tangentially involved in this case. The question is one of deed interpretation, the resolution of which falls on the language of this deed, the intent of the parties, and the circumstances surrounding its creation.

STATEMENT OF THE CASE

Harris, in her petition now before this United States Supreme Court, has distorted the relationship of several federal elements involved in this case in an effort to entice this Court into invoking its discretionary jurisdiction. In truth, this is simply a deed interpretation case. As Harris stated in her brief to the Washington State Court of Appeals, Division II:

> "[I]n the final analysis, the dispute boils down to a simple matter of deed construction."

See App. B, at 13.

Harris is the founder and leader of a group called Citizens Against the Trail (CAT). This group was organized in the mid 1980s to oppose development of a 26-mile linear park in Pierce County along the abandoned railroad right of way of the Burlington Northern Railroad. Under her leadership, CAT has forced the Pierce County Parks Department to be involved in more than 30 public hearings.

CAT has unsuccessfully made claims to the Washington State Public Disclosure Commission against the Pierce County Parks Director, has literally cost the Parks Department hundreds of thousands of dollars in the public hearings and in the delays, and even brought the matter before the people of Pierce County in a referendum, a referendum which CAT lost. Throughout all of this, Mary Harris has been the primary spokesperson and leader of the CAT organization.

The route of the linear park, known as the Foothills Trail ("Trail"), was approved by Ordinance 87-124 by the Pierce County Council in 1987. Then, as if to poise for confrontation, Harris entered into a purchase and sale agreement with Opal Winkelman on July 24, 1987, for two small parcels of land bracketing the right of way. Within this purchase and sale agreement, which was drafted by Harris and her real estate agent, she incorrectly placed the term "easement" in the document in describing the railway right of way.

By the time the deal had been finalized on October 29, 1987, with the execution of a statutory warranty deed, the erroneous "easement" language had been stricken. Harris and her attorney reviewed the language of the warranty deed, with this conspicuous correction included in the legal description. Despite Harris' earlier apparent misconception in the purchase and sale agreement about the nature of the railroad right of way, no objections were raised by either Harris or her attorney about the terms of the deed, even though the deed now correctly indicated that the railroad's interest was not merely an "easement."

Harris paid $7,000 for these parcels, the total acreage of which was less than half an acre. The property along the right of way to the south was purchased for $143,000 by Ski Park Farms, Inc.,[1] a corporation owned by a small group of people. Ski Park Farms, from the very beginning, wanted to donate the portion of the right of way adjacent to their property to the county for its inclusion in the Trail.

Harris, in an attempt to stop the Trail, made a claim to all of the right of way located in the quarter section in which her property was located. This included almost a quarter of a mile of right of way, far removed from the Harris property.

The map used by the state appellate lower courts is included in the Appendix. *App. C, at 20.* This map differs from the map included in the Petitioner's brief. As the map used by the state courts accurately reflects, Ski Park Farms did not claim or quiet title to that portion of the right of way located adjacent to the Harris properties. *See App. E* for the map illustrating the legal description included in the Judgment on Mandate.

Harris also engages in what can be best termed a *reductio ad absurdem* in regard to the amount of money Ski Park Farms paid Winkelman for the quitclaim deed covering the right of way. *See Petition, at 7.* Based on some undefined equation, Harris mysteriously arrives at a low figure as the amount paid by Ski Park Farms for the

---

[1] In accordance with United States Supreme Court Rule 29.1, Ski Park Farms, Inc., has no parent or subsidiary corporations.

disputed right of way. Without engaging in the same misleading calculus, Harris' attempt only underscores the fact that she paid $7,000 for her remote parcels of land and Ski Park Farms paid $143,000 for its land adjacent to the disputed area.

This disputed portion of the right of way is important, not because it is a valuable real estate investment, but because of the need for the Trail to be continuous. The disputed area also contains a trestle over a very beautiful wetlands. Harris' sole intent has been to remove the trestle and stifle the efforts to include a vitally important part of the Trail. Harris began to dismantle the trestle in a salvage operation in January of 1988. *See Petition, at 9.*

This Court should not be misguided by Harris' attempts to create a federal issue out of this case. As her own words state, this has always been a case of deed interpretation. Her case was heard by both the Washington State Court of Appeals and the Washington State Supreme Court. She moved for reconsideration each time, and ultimately failed each time. Extensive briefings were done by both sides, with oral arguments before both courts.

This latest petition is simply another feeble attempt on her part to destroy the opportunity for the people of Pierce County to establish a linear park which would serve all of the people of Pierce County, as well as those of other counties, and preserve a green belt for some of the most beautiful portions of our county.

REASONS FOR DENYING THE PETITION

Harris' Petition for Certiorari should be denied because the Washington State Supreme Court correctly held that the statutory warranty deed from Winkelman to Harris excepted a fee interest in the abandoned railroad right of way property. This exception allowed Winkelman to transfer the right of way property to Ski Park Farms.

The decision of the state supreme court underscores the fact that this issue, a simple deed construction problem, completely lacks the requisite significance to invoke the discretionary jurisdiction of this Court. Petitioner has crafted the appearance of a federal concern, but this is a ruse. The federal elements of this case have never really been disputed. In fact, little in this case has been disputed other than the interpretation of the deed and the intent of the parties. These issues simply do not merit the attention of this esteemed Court.

The lower courts' ruling that this unique fact pattern resulted in a fee interest having been reserved and excepted from the Harris purchase will have no cognizable impact on anyone other than the parties. Harris attempted to "land grab" the right of way which no federal statute, nor any case law, would authorize her to claim. Her reliance now on federal statutes constitutes yet another misrepresentation to this Court.

1. The federal elements involved in this case are only tangentially related to the interpretation of the deed and do not raise important federal issues.

The Harris Petition displays a fundamental misunderstanding of the federal law involved. This is evident from the initial argument that the limited fee concept has become "obsolete" (*see Petition, at 12*) to its apparent belief that the Thirteenth Amendment of the United States Constitution reads: "Section 1. Civil rights: . . . 'nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' " (*See Petition, at 28*).

This misstatement of the law should be addressed according to Rule 15 of the Rules of the Supreme Court. The Thirteenth Amendment of the United States Constitution reads:

> Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

The language which Harris quoted comes from Section 1 of the Fourteenth Amendment of the United States Constitution. Similar misconstructions occur throughout the brief.

For example, Harris contends that the "evolution" of railroad right of way land grants stands as a reason that this case deserves notice by this Court. However, both the

state court of appeals and the state supreme court have stated that, under the ***particular circumstances surrounding the deed in this case,*** the deed conveyed to Harris withheld a fee interest to property that had once been a railroad right of way. This point deserves emphasis: this case involves highly-particularized facts unique to this dispute which dictated how the deed was interpreted by the state courts.

As the lower courts recognized, the evolving interpretation of the term "right of way" does not affect the nature of individual acquisitions of lands pursuant to the 1864 Land Grant Act.[2] This grant was a limited fee with a right of reverter, and the state supreme court determined that all conveyances by the Burlington Northern Railway and its predecessor in interest, the Northern Pacific Railway Company, preserved this limited fee. *See App. A.*

Harris also misdirects this Court by referring to the role of the Interstate Commerce Commission ("ICC") in this matter. No dispute has ever been raised previously about the ICC role, or rather lack of role, in this case.

On December 7, 1984, the ICC authorized Burlington Northern to abandon the right of way. The certificate issued by the ICC did not serve to effectuate an abandonment of Burlington Northern's interest in the right of way. Not only was this issue never contested, but this assertion is meaningless. The important point is that Burlington Northern then abandoned the right of way on February 15, 1985, pursuant to 43 U.S.C. §912. *See App. A-5.*

---

[2] Land Grant Act of 1864, 13 Stat. 365.

As the lower courts recognized, Winkelman held title to the land subject to the right of way. And, although she was not aware of the abandonment, the title to the right of way vested in Winkelman with the abandonment pursuant to 43 U.S.C. §912. Title may also have reverted to Winkelman under state law. *See Roeder v. Burlington Northern, Inc.*, 105 Wash. 2d 269, 714 P.2d 1170 (1986). Under either the federal statute or state law, Winkelman possessed a fee interest at the time the warranty deed was conveyed to Harris.

2. The Washington State Supreme Court correctly interpreted the deed based on the particular language of the deed and the intent of the parties.

The Washington State Supreme Court based its decision on the plain language of the statutory warranty deed and the subsequent quitclaim deed of the reverted fee interest to Ski Park Farms. A full analysis relating to this interpretation of the deed will not be repeated here. It is amply covered in the record. *See App. A.*

It bears noting that the state supreme court simply held that the original reservation and exception of a right of way for the Northern Pacific Railroad reserved and excepted a fee interest in the property. All subsequent conveyances of the servient estate did not affect this fee interest.

The abandonment of the right of way by the railroad resulted in a reversion of the fee interest to Opal Winkelman, the owner of the property. Winkelman then conveyed by statutory deed a portion of the acreage to Petitioner Harris, reserving a fee interest in the railroad

right of way, and conveying the remainder of its property interest by quit claim deed to Ski Park Farms.

Aside from her unsupportable claim that limited fee interest railroad rights of way no longer exist, Harris has essentially staked her claim on the existence of the "easement" language which she had drafted into the preliminary purchase and sale agreement for the parcels of land northwest of the disputed area.

Both the state court of appeals and the state supreme court noted that the language of the purchase and sale agreement drafted by Harris and her agent carried little weight in assisting them in interpreting the intent of the parties. By the time the deal had been finalized with the execution of a statutory warranty deed, the erroneous "easement" language had been stricken. Harris and her attorney reviewed the language of the warranty deed, with this conspicuous correction, prior to the closing.

Despite Harris' misconception in the purchase and sale agreement about the nature of the railroad right of way, no objections were raised by either Harris or her attorney about the accurately revised terms of the deed. The deed at the time of the execution correctly indicated that the railroad's interest was not merely an "easement."

More importantly for purposes of this review, the "easement" argument involves questions of state law. No federal statutes or federal issues are implicated.

3. The interpretation of the deed lacks the sufficient public interest or federal importance elements required to merit invoking the discretionary jurisdiction of this Court.

Although the outcome of this particular case affects a portion of the Trail, the case itself does not involve a matter of public interest. This is simply a case involving a court interpretation of a particular deed and the intent of the parties to this deed.

The Harris Petition lacks the requisite "special and important reasons" which would call for the invocation of this Court's discretionary jurisdiction. While Harris' Petition has attempted to disguise this simple deed construction in federal drapery, the resolution of the matter does not involve any of the generally required characteristics of a case before this Court:

1. This case does not involve a decision by the United States Court of Appeals;

2. While this case does involve a decision by a state court of last resort, this court's decision does not involve a federal question of law. It merely resolves a deed construction dispute. It seems unfathomable that the peculiar fact pattern which dictated the resolution of this dispute would in any manner interest other courts of last resort or a United States Court of Appeals;

3. An interpretation of the statutory warranty deed involved in this fact-driven case does not raise potentially important questions of federal law which come before this Court, nor would an interpretation in any way conflict with decisions in the past by this Court.

In summary, the state court of appeals and the state supreme court correctly resolved this dispute. They accomplished this through the use of the basic legal principles, deed construction, and intent of the parties. This elementary matter simply does not rise to a level of importance sufficient to merit this Court's attention.

Harris misguides this Court by fabricating a federal appearance where none exists. She cites cases among various courts across the nation which have dealt, not with conflicting interpretations of a question of federal law, but with various resolutions of disputes driven by similarly unique fact patterns.

Disputes such as this one are unique because they deal with parties' intent and language in successive deeds which have been changing hands since the 19th-century. Simple deed constructions and interpretations of the intent of the parties should not waste the time of this Court.

Harris draws this Court's attention to the Interstate Commerce Commission in hopes of infusing this matter with a federal flavor. The ICC's role in this matter is inconsequential to the resolution of this matter, as is readily apparent from the facts.

Harris even draws the United States Constitution into the fray in a desperate effort to intrigue this Court. Even though Harris displays an evident confusion regarding the content of the various amendments, neither the Thirteenth Amendment's prohibition against slavery nor the Fourteenth Amendment's protection against government deprivation of life, liberty, or property without due process has anything remotely to do with this case.

Finally, Harris turns this Court's attention to the inevitable in this matter: simple state law concerning deed construction and intent of the parties. Both the state court of appeals and the state supreme court adroitly applied these basic principles to the unique facts of this case.

CONCLUSION

For these reasons, Respondent Ski Park Farms, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari of Mary Harris.

DATED this 29th day of October, 1993.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM
BRADLEY A. MAXA
Counsel of Record
DONNA R. TAIT
Counsel for Respondent

[No. 58600-4. En Banc.

MARY E. HARRIS, Petitioner, v. SKI PARK FARMS, INC., Respondent.

(Filed Feb. 11, 1993)

[1] Judgment – Summary Judgment – Issues of Fact – Material Fact – What Constitutes. For purposes of a summary judgment proceeding, a material fact is one upon which the outcome of the litigation depends.

[2] Judgment – Summary Judgment – Review – Role of Appellate Court. When reviewing a summary judgment, an appellate court engages in the same inquiry as the trial court. It considers the facts submitted and all the reasonable inferences therefrom most favorably toward the nonmoving party and upholds the summary judgment if reasonable persons, after considering all the evidence, could reach only one conclusion.

[3] Easements – What Constitutes – Distinguished From Right of Way. An "easement" is a right, distinct from ownership, to use the land of another in some way, without compensation. A "right of way" is a right of passage over a tract.

[4] Property – Right of Way – Conveyance – Easement or Fee. Whether a conveyance of a right of way is a fee simple interest or an easement presents a mixed question of law and fact. The intent of the parties is a question of fact; the legal consequences of the intent is an issue of law.

[5] Deeds – Construction – Intent of Parties – Parol Evidence. A deed is construed so as to give effect to the parties' intent which is derived from the entire instrument. If the deed is ambiguous, the court may

consider the situation and circumstances of the parties at the time of the grant.

[6] Deeds – Exception – Scope – Intent of Parties. The nature of the property interest subject to an exception in a deed depends on the intent of the parties.

[7] Contracts – Construction – Extrinsic Evidence – Context Rule – In General. Extrinsic evidence regarding all the circumstances surrounding the making of a contract is admissible as an aid in determining the parties' intent. The admission of extrinsic evidence is not dependent on the presence of an ambiguity in the contract.

[8] Deeds – Construction – Intent of Parties – Against Grantor. An unambiguous deed is construed in accordance with the parties' intent; it is not necessarily construed in favor of the grantee.

[9] Contracts – Construction – Intent of Parties – Subsequent Conduct. Evidence of party's conduct after entering into a contract is admissible as an aid in determining the party's intent at the time of entering into the contract.

Railroads – Right of Way – Abandonment – Conveyance With Exception – (Subject of Action).

Property – Right of Way – Distinguished From Easement – (Subject of Action).

BRACHTENBACH and ANDERSEN, JJ., concur in the result only; MADSEN, J., did not participate in the disposition of this case.

Nature of Action: Action to quiet title to a railroad right of way that was abandoned before common grantors had conveyed their interests to the plaintiff and the defendant. The plaintiff acquired her interest by warranty

deed containing an exception for the railroad right of way. The defendant later acquired its interest by quitclaim deed.

Superior Court: The Superior Court for Pierce County, No. 87-2-01090-8, E. Albert Morrison, J., on September 7, 1988, entered a summary judgment quieting title in the plaintiff.

Court of Appeals: The court at 62 Wn. App. 371 *reversed* the judgment and *quieted title* in the defendant, holding that the grantors had retained their fee interest in the right of way by excepting it from the conveyance.

Supreme Court: Holding that the grantors and the plaintiff intended to except a fee interest, not an easement, in the railroad right of way and that such fee interest was conveyed to the defendant in the quitclaim deed, the court *affirms* the decision of the Court of Appeals.

Sampson & Wilson, Inc., P.S., by *Susan Rae Sampson* and *Duncan C. Wilson*, for petitioner.

Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, by *Bradley A. Maxa*, *Donna R. Roper*, and *Stephanie A. Arend*, for respondent.

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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

MARY E. HARRIS,	)	Number 58600-4
Petitioner,	)	En Banc
v.	)	(Filed Feb. 11, 1993
SKI PARK FARMS, INC.,	)	
Respondent.	)	

SMITH, J. – Petitioner Mary E. Harris asks for review of a decision of the Court of Appeals reversing the trial court's summary judgment which quieted title in petitioner to a parcel of property burdened with a railroad right of way. The Court of Appeals remanded to the Superior Court with instructions to enter summary judgment quieting title in Respondent Ski Park Farms, Inc. We granted review and affirm the Court of Appeals.

The single issue before the court in this case is whether the Court of Appeals erred in granting summary judgment in favor of Respondent Ski Park Farms, Inc., and ruling that a statutory warranty deed from its predecessor in title, Winkelman, to Petitioner Harris reserved or excepted a fee interest, and not merely an easement, in the abandoned railroad right of way property.

On July 2, 1864, pursuant to the 1864 Land Grant Act,[1] Northern Pacific Railroad Company (Northern Pacific) acquired ownership to a parcel of land described in the original handwritten conveyance as "the East half

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[1] Land Grant Act of 1864, 13 Stat. 365.

of the North East quarter of section twenty-seven (27) of Township nineteen (19) North, range five (5) East of the Willamette Meridian."[2] Petitioner Harris in her brief refers to the property as the "southeast quarter of the northeast quarter of Section 27, Township 19 North, Range 5 E."[3] On August 12, 1876, the Northern Pacific Railroad Company, by deed, conveyed certain property in Pierce County to Samuel Wilkeson, Jr. The deed included the legal description of the disputed property and contained an exception as follows:

> [The] East half of the North East quarter of section twenty seven (27) of Township nineteen (19) North, range five (5) East of the Willamette Meridian. . . .
>
> [R]eserving and excepting, however, from the above described premises *a strip of land two hundred feet wide, extending through the same on the line of the railroad* of the said Northern Pacific Railroad Company or on the line of any of its branches, *to be used for a right of way*, or for other railroad purposes, in case the line of said railroad or any of its branches has been or shall be located on or over said described pieces or parcels of land and premises, (being part of the same land granted to the party of the first part by the United States of America under and by virtue of the said Act of Congress, approved the second day of July 1864, and included in the

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[2] Clerk's Papers, at 182.

[3] Brief of Petitioner, at 4. This is consistent with the legal description in the title report dated November 10, 1987. Clerk's Papers, at 255.

> aforesaid mortgage,) together with all and singular, the improvements waters, water courses rights, liberties, privileges, herditaments and appurtenances whatsoever thereunto belonging or in any wise appertaining, and the reversions and remainders, rents issues and profits thereof and all the estate, rights title interest, profits claim and demand whatsoever, of them the parties of the first and second parts in law equity or otherwise, howsoever of in and to the same and every part thereof. . . . [4]

(Italics ours.)

The trial court in its order granting summary judgment[5] and the Court of Appeals in its opinion[6] use the same legal description used by appellant and substantially the same language of the exception. However, the tax deed relied upon by Petitioner Harris identifies the property as "[t]hat portion of the northeast quarter of the northeast quarter of Section 27 township 19 north range 5 east lying southeasterly of Orting-South Prairie Highway Except railroad right of way Easement of record."[7]

Subsequent conveyances of the parcel passed the property from Hiram O. and Ethel E. Sabin to John J. and

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[4] Clerk's Papers, at 182. The language is transcribed from a copy of the original handwritten deed included in the Clerk's Papers, the original of which is on file in volume 5 of Deeds, Pierce County, at 351-54.

[5] Clerk's Papers, at 346.

[6] *Harris v. Ski Park Farms, Inc.*, 62 Wn. App. 371, 814 P.2d 684 (1991).

[7] Clerk's Papers, at 84.

Opel V. Winkelman on May 10, 1946.[8] The warranty deed contained the following legal description:

> [T]he northeast quarter of southeast quarter, and that part of the southeast quarter of northeast quarter of Section Twenty-seven (27), Township Nineteen (19) North, Range Five (5) East of the Willamette Meridian, lying east of the South Prairie Creek:
>
> *EXCEPT the right of way of the Northern Pacific Railway Company* . . . and EXCEPT tracts appropriated by Northern Pacific Railway Company in Cause No. 74807 . . . and Pierce County in . . . Cause No. 44906.[9]

(Italics ours.) Petitioner Harris acquired the property by a tax deed dated December 20, 1983, from the Pierce County Assessor-Treasurer. That deed described the property as:[10]

> Parcel No. 05-19-27-1-006
>
> That portion of the northeast quarter of the northeast quarter of Section 27 township 19 north range 5 east lying southeasterly of Orting-South Prairie Highway Except railroad right of way Easement of record.

Burlington Northern Railroad Company (Burlington Northern) acquired Northern Pacific's interest in the right

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[8] Clerk's Papers, at 200. The record does not indicate intervening conveyances prior to Sabin's conveyance to Winkelman.

[9] Clerk's Papers, at 303.

[10] Clerk's Papers, at 84.

of way.[11] On December 7, 1984, the Interstate Commerce Commission authorized Burlington Northern to abandon the right of way. It was abandoned by Burlington Northern on February 15, 1985,[12] pursuant to 43 U.S.C. § 912, which provides:

> Whenever public lands of the United States have been . . . granted to any railroad company for use as a right of way for its railroad . . . and use and occupancy of said lands for such purposes has ceased . . . by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon, all right, title, interest, and estate of the United States in said lands shall, . . . be transferred to and vested in any person . . . to whom . . . title of the United States may have been . . . granted, *conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad . . . without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever. . . .* [13]

At the time of abandonment, Ms. Opel V. Winkelman and the Winkelman Family Trust (Winkelman) held title to the land subject to the right of way. Although Winkelman was not aware that the right of way had been abandoned, pursuant to 43 U.S.C. § 912 title to the right of way vested in Winkelman upon its abandonment.

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[11] Clerk's Papers, at 22. The record does not indicate the date of this acquisition.

[12] Clerk's Papers, at 248.

[13] (Italic ours.) 43 U.S.C. § 912.

On April 23, 1987, Winkelman by real estate contract conveyed 60 acres of the parcel (Lot 6) to Ski Park Farms (Ski Park) for $143,500.[14] On July 24, 1987, Ms. Mary E. Harris (Harris) entered into a purchase and sale agreement with Winkelman for two parcels of the property, one of which was bisected by the right of way. The sale price was $7,000. Ms. Harris prepared the legal description of the property for the purchase and sale agreement, signed by Winkelman, which included the following description:[15]

> All of that portion of tax parcel #05-19-27-1-003 lying between State Route 162 (Pioneer Way) and the South Prairie-Carbon River Road *excepting the Northern Pacific Railroad right-of-way easement.*
>
> All of that portion of tax parcel #05-19-26-2-007 lying between the South Prairie Creek and the South Prairie-Carbon River Road *excepting the Northern Pacific railroad right-of-way easement.*

(Italics ours.)

The sale to Ms. Harris closed on October 29, 1987. The closing documents, including the deed and preliminary title insurance, were reviewed by Ms. Harris and her attorney prior to closing. The statutory warranty deed included the following descriptions:

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[14] Clerk's Papers, at 201. The contract reserved "a 30 foot non-exclusive easement for ingress, egress and utilities. . . . " The document in the file is not signed, but a declaration asserts that the transaction was executed. That assertion is not contested. Clerk's Papers, at 216.

[15] Clerk's Papers, at 245. The document referred to a sketch which was attached.

PARCEL A:

That portion of the West Half of the Northwest quarter of section 26, Township 19, North range 5 East, Willamette Meridian, Pierce County, Washington lying, Southeasterly of South Prairie Creek and Northwesterly of South Prairie-Carbon River County Road, *Excepting there from right of way of the Burlington Northern (Formerly Northern Pacific) Railway Company.*

PARCEL B:

That portion of the Southeast Quarter of the Northeast Quarter of Section 27, Township 19, North Range 5 East of the Willamette Meridian, Pierce County, Washington, which lies Southeasterly of the Southeasterly margin of State Route 162 (Pioneer Way) and northwesterly of South Prairie-Carbon River County Road, *Excepting there from right of way of the Burlington Northern (formerly Northern Pacific) Railway Company.*[16]

Situate in Pierce County, Washington.

SUBJECT TO Easements, Restrictions, Reservations, Conditions, and Provisions of record.

(Italics ours.)

On February 24, 1988, Winkelman by quitclaim deed conveyed its interest in the right of way to Ski Park, reserving to Winkelman "a 30 foot non-exclusive easement for ingress[,] egress and utilities. . . . "[17] The deed conveyed:

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[16] Clerk's Papers, at 207, 255.

[17] Clerk's Papers, at 212-13.

That portion of the Burlington Northern Railroad Company's (formerly Northern Pacific Railway Company) McMillan to Buckley, Washington Branch Line right-of-way, now abandoned, located upon, over and across section 27, Township 19 North Range 5 East, W.M., described as follows:

All that portion of said Railroad Company's 400 foot wide Branch Line right-of-way being 200 feet on each side of said Main Track centerline in the North half of the Southeast quarter of said Section 27, lying Northerly of the West production of the South line of Lot 6 of Survey No. 8701200255, recorded January 2, 1987, and South of the North line of said North half of the Southeast quarter of said Section 27.

Also all that portion of said Railroad Company's 200 foot wide Branch Line right-of-way being 100 feet on each side of said Main Tract centerline in the Southeast quarter of the Northeast quarter of said Section 27, lying North of the south line of said Southeast quarter of the Northeast quarter of said Section 27, and lying South of North line of said Southeast quarter of the Northeast quarter of said Section 27.

Additional Terms and conditions: see schedule A. attached.

. . . .

SCHEDULE A

EASEMENT AND RESERVATION

The sellers herein further RESERVE unto themselves, their heirs, successors and assigns a 30 foot non-exclusive easement for ingress[,] egress and utilities along the South line of which

> is the West Production of the South line of lot 6 of survey No. 8701200255, for the benefit of Lots 4 and 5 of said survey and each and every subdivision thereof.
>
> Said easement may also be conveyed by the sellers herein to each and every lot owner between the Carbon River and the South line of Lot 6 of said survey or any future reciprocal easement agreements.

On March 10, 1988, in a third amended complaint, Petitioner Harris brought an action against Ski Park to quiet title to the right of way property.[18] Ski Park filed a motion for summary judgment and Ms. Harris filed a cross motion for summary judgment to quiet title. On July 5, 1988, Judge E. Albert Morrison, Pierce County Superior Court, denied both motions, concluding that the matter presented factual questions which could not be resolved on summary judgment.[19] Both parties filed motions for reconsideration. On July 22, 1988, the court heard the motions. At that time, counsel for both parties agreed that all material facts in the case were before the court.[20]

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[18] Clerk's Papers, at 135. Petitioner Harris and 39 other plaintiffs (Citizens Against the Trail) initially filed a quiet title action on February 20, 1987. Ski Park was joined as a defendant with an interest in the subject property. Since the claims between Ms. Harris and Ski Park were unlike the claims of the other parties, the trial court bifurcated the action. Only Petitioner Harris is a party before this court. Clerk's Papers, at 173.

[19] Report of Proceedings, at 64.

[20] Report of Proceedings, at 108.

The trial court later on September 7, 1988, granted summary judgment quieting title in Petitioner Harris.[21] The court considered the declarations of several persons. Clark R. McGowan (McGowan), a real estate broker, was Winkelman's representative in the sale. He declared that no verbal or written representation was made to convey the right of way to Harris and that the exception language clearly showed intent not to convey the right of way.[22] McGowan employed John Becker (Becker), a professional land surveyor, to draft the legal description in the deed. Becker declared that Winkelman expressed no intention to reserve a fee interest in the right of way, that the exception language was to recognize that Burlington Northern had and might still have an interest in the right of way, and that if he had been instructed to prepare a deed that reserved a fee interest in the right of way, he would not have used the language that appears in the deed.[23]

The declaration of Winkelman stated that it would not have quitclaimed the right of way to Ski Park if it believed the property had already been conveyed to Ms. Harris and that it did not sell any ownership rights to the right of way property to her.[24] However, Ms. Harris in an unsigned declaration asserted that it was her intention to acquire a fee interest in the property formerly subject to the right of way, and that it was her understanding that she was acquiring the underlying fee in the right of way

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[21] Clerk's Papers, at 344.

[22] Clerk's Papers, at 259.

[23] Clerk's Papers, at 266.

[24] Clerk's Papers, at 216.

from Winkelman.[25] We can give no credence to the declaration because it was not signed and contained the notation "Original to be filed when signature obtained".[26] The record before us does not contain the signed document.

The parties stipulated before the trial court that there were no facts material to resolution of the motions for summary judgment which were not before the court.[27]

On appeal, the Court of Appeals, Division Two, reversed the trial court and quieted title in Ski Park. The court held that in the conveyance to Petitioner Harris, Winkelman intended to "reserve whatever interest in the right of way they owned." The court noted that "[a]lthough not known to Winkelman, the right of way had been abandoned and Winkelman now owned all interest in the property where the right-of-way had previously existed." It further stated that "[i]f the conveyance to Harris was intended to transfer the property where the right of way had existed, the exception language was superfluous."[28] The court concluded that:[29]

> [W]inkelman intended to reserve the property where the abandoned right of way traversed the quarter sections Winkelman conveyed to Harris. The later conveyance from Winkelman to Ski Park vested title to the abandoned right of way property in Ski Park. The

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[25] Clerk's Papers, at 261.

[26] Clerk's Papers, at 265.

[27] Report of Proceedings, at 96, 97, 99, 108.

[28] *Harris v. Ski Park Farms, Inc.*, 62 Wn. App. 371, 377, 814 P.2d 684 (1991).

[29] *Harris*, at 377.

court erred in quieting title to the abandoned right of way property in Harris.

The court then remanded to the trial court with instructions to enter summary judgment quieting title in Ski Park "to that disputed portion of the abandoned right of way property described in Winkelman's quitclaim deed to Ski Park Farms, Inc."

On December 3, 1991, this court granted review.

Petitioner Harris claims that she acquired from Winkelman a fee interest in the right of way. She acknowledges that the 1987 warranty deed from Winkelman to her contains the clause "excepting there from right of way of the Burlington Northern (formerly Northern Pacific) Railway Company." However, she contends that this excepts merely an easement and not the underlying fee interest. She further contends that abandonment of the right of way by Burlington Northern in 1985 by operation of law resulted in her acquisition of the fee interest in the right of way. Ski Park claims a fee interest in the right of way through its 1988 quitclaim deed from Winkelman. It contends that the exception in the warranty deed from Winkelman to Harris excepted a fee interest in the right of way; and that the subsequent quitclaim deed from Winkelman to Ski Park thus gave Ski Park the fee interest in the right of way.

Summary judgment is appropriate "if the pleadings, depositions, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law."[30] A material fact is one upon which the outcome of the litigation depends.[31] The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.[32] On review of summary judgment an appellate court engages in the same inquiry as the trial court.[33]

The term "right of way" may mean a "mere right of passage over a tract, and sometimes to describe the strip of land which railroad companies purchase, or otherwise compulsorily acquire, upon which to construct their railroad."[34] The term "easement" means a "right, distinct from ownership, to use in some way the land of another, without compensation."[35]

"A conveyance of a right-of-way to a railroad may be either in fee simple or may be an easement only."[36] "The interpretation of such a deed to determine its effect is a mixed question of fact and law. It is a factual question to determine the intent of the parties. Then we must apply

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[30] CR 56(c).

[31] *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977).

[32] *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982).

[33] *Marincovich v. Tarabochia*, 114 Wn.2d 271, 787 P.2d 562 (1990).

[34] *Morsbach v. Thurston Cy.*, 152 Wash. 562, 568, 278 P. 686 (1929).

[35] *Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986).

[36] *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

the rules of law to determine the legal consequences of that intent."[37]

This court in *Morsbach v. Thurston County* stated that a railroad right of way is more than an easement.[38] But that statement was clarified in *Swan v. O'Leary*, which stated that the intention of the parties to the conveyance is of paramount importance and must ultimately prevail in a given case.[39] In determining the intent of the parties, courts have considered whether the consideration was substantial or nominal, whether the deed conveyed a strip or tract of land and limited its use to a specific purpose, whether the deed contained a habendum clause, and whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor.[40] When the granting clause of a deed conveys a right of way to a railroad, this court has usually concluded that the deed passes an *easement* and not a *fee with a restricted use*:

> [I]t is clear that we adopted the rule that when the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad the deed passes an easement only, and not a fee with a restricted use, even though the deed is in the usual form to convey a fee title.[41]

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[37] *Veach*, at 573.

[38] *Morsbach v. Thurston Cy.*, 152 Wash. 562, 278 P. 686 (1929).

[39] *Swan v. O'Leary*, 37 Wn.2d 533, 225 P.2d 199 (1950).

[40] *Swan v. O'Leary, supra.*

[41] *Veach v. Culp*, 92 Wn.2d 570, 574, 599 P.2d 526 (1979) (quoting *Swan v. O'Leary, supra*). *See King Cy. v. Squire Inv. Co.*, 59

In *Veach v. Culp*,[42] the court reiterated the "well established principle" that "we must look to the actual use being made of . . . [the] easement in light of the rule that the servient owner retains the use of the easement so long as that use does not materially interfere with the use by the holder of the easement."[43] The plaintiffs in that case sought removal of a chain link fence blocking their access along a railroad right of way which crossed their property. The railroad made minimal use of its track. The court concluded that because of the railroad's limited use of the easement, the plaintiffs, as holders of the subservient estate, were entitled to use the right of way in such a manner that it would not materially interfere with the railroad's use of it.

Both Petitioner Harris and Ski Park agree that this case involves an interpretation of deeds problem. The interpretation of a right of way deed is a mixed question of fact and law.[44] A court should construe a deed grant in a manner which gives effect to the intent of the parties.[45] The intent of the parties is to be derived from the entire instrument and, if ambiguity exists, the situation and circumstances of the parties at the time of the grant are to be considered.[46]

Wn. App. 888, 801 P.2d 1022 (1990) (Washington cases show a strong tendency to consider such rights of way as easements).

[42] 92 Wn.2d 570, 599 P.2d 526 (1979).

[43] *Veach*, at 575.

[44] *Veach v. Culp, supra; Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 567, 716 P.2d 855 (1986).

[45] *Zobrist v. Culp*, 95 Wn.2d 556, 627 P.2d 1308 (1981).

[46] *Zobrist*.

Since both Harris and Ski Park filed motions for summary judgment, the facts must be reviewed in the light most favorable to the nonmoving party in considering each motion.

I

Ski Park Motion For Summary Judgment

Ski Park argues that in the grant from Winkelman to Ms. Harris, it was the parties' intent to except a fee interest in the right of way and not merely an easement and that Winkelman therefore subsequently quitclaimed to Ski Park a fee interest in the right of way. In support of its position, Ski Park argues (1) that the terms "excepting" and "right of way" except a fee interest, (2) that because Winkelmman owned the right of way in fee at the time of the grant to Ms. Harris, the deed excepted a fee interest, and (3) that the doctrine of merger prevents use of the purchase and sale agreement to interpret an ambiguity in the deed.

Ski Park cites an early case to define the term "exception" as a "clause in a deed which withdraws from its operation some part of the thing granted, and which would otherwise have passed to the grantee under the general description [and] [t]he part excepted is in existence at the time of the grant, and remains . . . unaffected by the conveyance."[47] Using this definition, it argues that use of the term "excepting" necessarily prevents the

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[47] *Biles v. Tacoma, O. & G.H.R.R.*, 5 Wash. 509, 32 P. 211 (1893). *See also Studebaker v. Beek*, 83 Wash. 260, 265, 145 P. 225 (1915).

grantee, Ms. Harris, from obtaining the entire fee interest in the property conveyed because Northern Pacific reserved a right of way, within its ordinary meaning, and because, before signing, Ms. Harris and her attorney reviewed the closing documents which made no reference to an easement.

An easement is a burden on the land and an interest in land.[48] The term "excepting" arguably could have been used by the parties to express their understanding that, although Ms. Harris was receiving a fee interest, her rights were not plenary, but subject to an easement. This would be consistent with Ms. Harris' assertion that she thought the deed was excepting only an easement and that she was in fact acquiring the underlying fee to the railroad right of way, but this assertion is not properly before us.[49]

The deed from Northern Pacific to Wilkeson did not explicitly reserve a fee. The right of way thus arguably could be considered as either a fee interest or simply an easement. The deed description of the right of way ("a strip of land two hundred feet wide") and its purpose ("to be used for a right of way, or for other railroad purposes") would ordinarily create an easement only and not a fee simple interest.[50] This is inconsistent with Ski Park's arguments that Northern Pacific reserved a fee and

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[48] *Kesinger v. Logan*, 113 Wn.2d 320, 779 P.2d 263 (1989) (an easement is an interest in land within the purview of the conveyance statute).

[49] Clerk's Papers, at 265. We cannot consider this assertion because it is contained only in an unsigned declaration.

[50] *Veach*, at 574.

that the common meaning of a right of way is a fee interest. Similarly, the fact that Ms. Harris and her attorney reviewed the closing documents and did not object to lack of reference to an easement does not necessarily support Ski Park's conclusion that a fee was excepted. Further, the deed was prepared by Winkelman's agent. Becker, who stated that if he had been instructed to reserve a fee interest, he would not have used the language used in the deed. This assertion, of course, is speculation and cannot of itself be used to establish the intent of Winkelman.

Burlington Northern abandoned the right of way in 1985, 2 years prior to Winkelman's conveyance to Ms. Harris. Ski Park argues that if the exception clause is interpreted as withholding only an easement, nothing would be withheld because the right of way no longer existed and Winkelman held the entire parcel in fee at the time it conveyed to Harris. The Court of Appeals, in granting summary judgment in favor of Ski Park, also focused on abandonment of the right of way. The Court of Appeals concluded that since the right of way was no longer in existence. Winkelman intended to reserve in fee the property where the right of way once existed. The court stated that its conclusion as to Winkelman's intent was necessary because to hold otherwise would make the exception language "superfluous". However, that language would be superfluous only if Winkelman intended to except an easement knowing that an easement no longer existed. Since Winkelman did not know of the abandonment (and the resulting fee interest), it cannot be said with certainty that it intended to reserve the fee interest in the right of way. This court has held that the

intent of the parties must prevail. The real estate contract between Winkelman and Ski Park dated April 23, 1987, which antedates the October 29, 1987, statutory warranty deed to Petitioner Harris, at least provides some support to a conclusion that Winkelman intended to reserve a fee interest in the railroad right of way, notwithstanding the confusion created by the language in the purchase and sale agreement prepared by Petitioner Harris.

Ski Park finally argues that, under the doctrine of merger, the purchase and sale agreement merged into the deed. The trial court, in granting summary judgment in favor of Ms. Harris, relied on the language of the purchase and sale agreement. However, the Court of Appeals held that the purchase and sale agreement was not controlling because it merged into the deed. Both Ski Park and the Court of Appeals rely on *Black v. Evergreen Land Developers*.[51] However, that case recognized that there were exceptions to the merger doctrine. This court has held that where the intent of the parties is not clearly expressed in the deed, courts may consider parol evidence.[52] In order to determine the intent of the parties, extrinsic evidence is admissible as to the entire circumstances under which a contract is made.[53]

This court has adopted the "context rule" which succinctly stated is that "extrinsic evidence is admissible as to the entire circumstances under which [a] contract [is]

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[51] 75 Wn.2d 241, 450 P.2d 470 (1969).

[52] *Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 269, 714 P.2d 1170 (1986).

[53] *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

made, as an aid in ascertaining the parties' intent", specifically adopting the Restatement (Second) of Contracts §§ 212, 214(c) (1981).[54]

This court in *Berg v. Hudesman*[55] rejected "the theory that ambiguity in the meaning of the contract language must exist before evidence of the surrounding circumstances is admissible" and overruled cases to the contrary.[56]

The purchase and sale agreement in this case may be considered as some evidence of the circumstances of the parties at the time of the grant. Even considering, in the light most favorable to Ms. Harris, that both Winkelman and Harris signed the purchase and sale agreement, a conclusion that the parties intended to except only an easement and not a fee interest ("excepting the Northern Pacific railroad right of way easement") is tenuous, at best.

Applying the rules on summary judgment, the undisputed facts in this case and the law favor summary judgment for Respondent Ski Park Farms.

II

Harris Motion For Summary Judgment

Petitioner Harris' position is that the deed excepted only an easement and since the easement was extinguished by the abandonment, she acquired a fee interest

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[54] *Bert*, at 667, 668.

[55] 115 Wn.2d 657, 801 P.2d 222 (1990).

[56] *Berg*, at 669.

in the entire parcel. She argues that the parties intended to except an easement and not a fee interest in the right of way and that an ambiguous deed should be interpreted in favor of the grantee. She further contends that the Court of Appeals erred in granting summary judgment in favor of Ski Park by concluding that the right of way had been abandoned when Winkelman did not even know of the abandonment at the time it granted the property to her.

To support her position that the parties intended to except an easement, petitioner argues that she used the term "easement" in the purchase and sale agreement, which was signed by Winkelman; that the phrase "railroad right of way" historically reserved an easement; and the language in the deed reflects the historical interpretation of the phrase. She further argues that her quiet title action was known to Winkelman and that was evidence that both parties knew that Harris intended to acquire the fee interest in the right of way. She also claims that because Winkelman did not know of abandonment of the right of way by the railroad, it could not have intended to except a fee interest it did not know it had. Any facts relating to the intent of the parties must be obtained from sources other than Petitioner Harris. Her declaration is unsigned and cannot be considered on the record before us.

Use of the term "easement" in the purchase and sale agreement and the historical interpretation of the phrase "railroad right of way" may provide some indication of Ms. Harris' intent to except only an easement, but it does not lead to the same conclusion on Winkelman's intent. Winkelman has stated that it did not intend to transfer

any ownership rights in the right of way to Ms. Harris. If Winkelman knew of her quiet title action, it may indicate some knowledge that Ms. Harris wanted a fee interest, but it does not indicate Winkelman's intent to convey a fee interest. McGowan, seller Winkelman's agent, stated that the sellers gave no indication of an intent to convey the right of way to Ms. Harris at closing or at any time in the future. Although Winkelman did not know the right of way had been abandoned and that it now held reversionary title to it, it meant to reserve under the exception whatever interest it had. Winkelman stated that its understanding of the exception language was that it excepted conveyance of the right of way regardless whether it was an easement or a fee interest. Therefore, viewing the facts in the light most favorable to Ski park, it cannot be said that the one conclusion reasonable persons could reach is that the parties intended to convey only an easement and not a fee interest.

Petitioner Harris argues that the deed should be construed in favor of the grantee. She states that the facts supporting her contention are that the deed was prepared by Becker, grantor Winkelman's agent; that Becker stated that he was not told to withhold the fee in the conveyance; and Becker stated that if he had been so instructed, he would have used language different from that used in the deed.

While ambiguity in a deed is resolved against the grantor,[57] the intent of the parties is of paramount importance.[58] The statutory warranty deed dated October 29, 1987, is not ambiguous. Any ambiguity is created by the language of the July 24, 1987 purchase and sale agreement. Winkelman stated that it did not intend to sell any ownership rights in the right of way. Viewing this fact in the light most favorable to Ski Park, it is reasonable to conclude that Winkelman intended to except a fee interest in the property and not merely an easement.

Petitioner Harris further argues that because neither party knew the status of the right of way, there was no intent to act as if the right of way had been extinguished and held in fee by Winkelman. However, on the record in this case, Ms. Harris could have known that the right of way was held by Winkelman in fee. Ms. Harris initiated a quiet title action in February 1987, 8 months prior to closing her purchase from Winkelman. In her complaint, she acknowledged that Burlington Northern abandoned the right of way in 1985 and that upon abandonment, the right of way immediately vested in the original grantors or their successors. One may infer that she knew Winkelman held a fee interest in the right of way and she nevertheless agreed to the exception. Petitioner contends that Burlington Northern's claim to the right of way was unsettled at the time of the conveyance. The only support for her contention is a letter she received from the Pierce County Prosecuting Attorney in January 1987 which

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[57] *Kunkel v. Meridian Oil, Inc.*, 114 Wn.2d 896, 901, 792 P.2d 1254 (1990).

[58] *Swan*, at 535.

advised her that Burlington Northern had not abandoned its claim to ownership to the property. Although there is no clear evidence that she had actual knowledge of ownership, she might logically have insisted that Winkelman quitclaim the right of way to her if she intended to acquire the fee interest in the right of way. This she did not do. As to Winkelman's intent, it stated that it would not have quitclaimed the right of way to Ski Park if it believed that it had already conveyed the property to Ms. Harris. Subsequent acts of a party to a contract are admissible to assist in ascertaining intent.[59] Winkelman's subsequent quitclaim of the right of way to Ski Park, and its prior sale by real estate contract, is consistent with its intent to convey only an easement to Petitioner Harris.

We agree with the Court of Appeals that the trial court erred in granting summary judgment quieting title in Petitioner Harris and that summary judgment should be granted in favor of Respondent Ski Park Farms, Inc., quieting title in it.

From the record in this case, we conclude that the reservation and exception granting a right of way to the Northern Pacific Railroad reserved and excepted a fee interest in the property; and that abandonment of the right of way by the railroad resulted in reversion to the owner of the property (Winkelman), who conveyed by statutory warranty deed a portion of the acreage to Petitioner Harris, reserving a fee interest in the railroad right of way, and conveying the remainder of its property

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[59] *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 510 P.2d 221 (1973).

interest by quitclaim deed to Respondent Ski Park Farms, Inc.

We affirm the Court of Appeals and remand the case to the trial court for entry of Summary judgment and quiet title in favor of Respondent Ski Park Farms, Inc.

/s/ Smith, J.

WE CONCUR:

/s/ Dore, C.J.

/s/ Utter, J.

/s/ Brachtenback, J.
concurs in result only

/s/ Dolliver, J.

/s/ Andersen, L.
concurs in result

/s/ Durham, J.

/s/ Guy, J.

/s/ Johnson, J.

APPENDIX B

No. 12321-5

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON, DIVISION II

MARY E. HARRIS

Respondent,

v.

SKI PARK FARMS, INC.

Appellant.

BRIEF OF RESPONDENT

(Filed April 24, 1989)

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TABLE OF CONTENTS

TITLE	PAGE
TABLE OF AUTHORITIES	iii
I. RESPONSE TO ASSIGNMENT OF ERRORS AND ISSUES	1
II. STATEMENT OF THE CASE	2
A. Factual Background	2
B. Procedural Background	6
III. SUMMARY OF ARGUMENT	7
IV. LAW AND ARGUMENT	8
A. The Parties Stipulated That the Facts Were Not in Dispute	8
B. The Stipulation of the Parties is Binding	9
C. The Findings of Fact and Conclusions of Law	11
D. This Case is Controlled by Principles of Deed Construction	13
E. Substantial Evidence Supports the Lower Court's Decision	15
1. *The Exception Language Was Ambiguous*	15
2. *The Merger Doctrine is Inapplicable*	16
3. *The Earnest Money Purchase and Sale Agreement Disclosed the Mutual Intent of the Parties That Only an Easement Was Excepted*	17
4. *The Trial Court Did Not Reform the Deed*	18
F. All of the Evidence Contemporaneous to the Sale Supports the Lower Court's Interpretation	19
G. The Lower Court's Interpretation of the Deed Does Not Render the Deed Exception Meaningless	21

H. The Lower Court's Interpretation of the Exception Does Not Render the Clause Nonsensical 21

I. The Fact That Other Deed Language Could Have Been Used Supports the Lower Court's Interpretation 23

J. The Lower Court's Interpretation is not Inconsistent With the Term "Excepting" in the Deed 24

V. CONCLUSION 25

VI. APPENDIX 28

TABLE OF AUTHORITIES

Baird v. Baird, 6 Wn.App 587, 444 P.2d 1387 (1972) 11

Black v. Evergreen Land Developers, 75 Wn.2d 241, 450 P.2d 470 (1969) 16

Carr v. B.N.R.R., 23 Wn.App 386, 597 P.2d 409 (1979) 13

Davis v. Lee, 52 Wn. 330, 100 P. 752 (1909) 16

Duckworth v. Bonney Lake, 91 Wn.2d 19, 586 P.2d 680 (1978) 9

H.A. & L.D. Holland Co. v. N.P.R.R., (9th Circuit 1914) 214 F. 920 22

Hodgins v. State, 9 Wn.App 486, 513 P.2d 304 (1973) 13

Lawson v. State, 107 Wn.2d 444, 730 P.2d 1308 (1986) 22

Lemen v. Pring Corp., 4 Wn.App 462, 482 P.2d 802 (1971) 14

Morgan v. Prudential Insurance Co., 86 Wn.2d 432, 545 P.2d 1193 (1976) 9

Reese v. Sears, 107 Wn.2d 563, 731 P.2d 497 (1987) 9

Smythe & Worldwide Movers, Inc. v. Whitney, 6 Wn.App 176, 491 P.2d 1356 (1971) 10

Standring v. Mooney, 14 Wn.2d 220, 127 P.2d 401 (1942) 14

State Bank v. Phillips, 11 Wn.2d 483, 119 P.2d 664 (1941) 13

Swan v. O'Leary, 37 Wn.2d 533, 255 P.2d 199 (1950) .. 22

Thomas v. Nelson, 35 Wn.App 868, 670 P.2d 682 (1983) 13

Vavrek v. Parks, 6 Wn.App 684, 495 P.2d 1051 (1972) 14

Woods v. Gott, (U.S.D.C. Del. 1950) 92 F.Supp 325 11

Zobrist v. Culp, 95 Wn.2d 556, 627 P.2d 1308 (1981) 14

STATUTES AND COURT RULES

Northern Pacific Land Grant Act of 1864, ch. 217, 13 Stat. 365 (1864) 21

Washington Superior Court Civil Rule 2A 9

OTHER AUTHORITIES

Black's Law Dictionary, 73 (Fifth Edition, 1979) 15

I. – RESPONSE TO ASSIGNMENT OF ERROR AND ISSUES

The Appellant, Ski Park Farms, Inc., (hereinafter "Ski Park") has assigned error to the trial court's order granting partial summary judgment to the Respondent, Mary

E. Harris (hereinafter "Harris") and ruling as a matter of law that the deed from Ski Park's predecessor in title to Harris excepted an easement from the terms of the conveyance.

Harris respectfully submits that the following are the issues presented by Ski Park's assignment of error:

1. The parties stipulated that the court had before it all of the facts that could be presented at trial, that there were no genuine issues of material fact, and that the matter was appropriate for summary judgment. Does the stipulation of the parties limit the scope of this review to errors of law?

2. The trial court determined that the deed to Harris was ambiguous and found that the parties to the deed intended to except an easement in favor of the railroad. Was the trial court's determination and finding supported by substantial evidence, the stipulated facts and principles of deed construction.

II. – STATEMENT OF THE CASE

A. Factual Background

This case arises out of the sale of real property from Opal Winkelman, Joan Nelson, Mary Eytinge and the Winkelman family trust (hereinafter "Winkelman") to Harris. The disputed property consists of a parcel between 140 and 200 feet wide and approximately 1400 feet long and is situated between two highways. A diagram of the property included within the terms of the sale is attached hereto and incorporated by this reference as "Exhibit A". There were not three small parcels as Ski

Park asserts but two parcels: one in Section 27 and one in Section 26. The property in question was formerly subject to a right-of-way for railroad purposes in favor of Burlington Northern Railroad as successor in interest to the Northern Pacific Railroad (C.P. 225-258).

Winkelman acquired its interest in the disputed property by warranty deed in 1946 from Sabin (C.P. 241). The deed from Sabin to Winkelman contained the following language: "except the right-of-way of the Northern Pacific Railway Company".

In July, 1987, Harris entered into an Earnest Money Purchase and Sale Agreement with Winkelman to buy the following described real property in Pierce County:

> All of that portion of tax parcel number 5-19-27-1-003 lying between State Route 162 (Pioneer Way) and the South Prairie-Carbon River Road *excepting the Northern Pacific Railroad right-of-way easement.*
>
> All of that of portion tax parcel 5-19-26-2-007 lying between South Prairie Creek and the South Prairie-Carbon River Road *excepting the Northern Pacific Railroad right-of-way easement.* (C.P.243, 244 and 245, emphasis supplied)

Winkelman was represented in this transaction by Clark McGowan, a real estate broker. When Harris initially contacted Winkelman she was told that they did not want to be personally involved in the transaction and that she should deal with McGowan (C.P. 262).

A preliminary title report was issued at the seller's order (C.P. 253). The report disclosed two relevant exceptions. One was a Lis Pendens filed by Harris including

the disputed property (see exception number one). The other was of continuing interests of the railroad in the disputed property (see exception number five).

On October 29, 1987, pursuant to the Earnest Money Purchase and Sale Agreement, Winkelman delivered a Statutory Warranty Deed to Harris. Harris paid $7,000.00 for the following described real property:

> Parcel A: That portion of the west half of the northwest quarter of Section 26, Township 19 North, Range 5 East of the W.M., Pierce County, Washington, lying southeasterly of South Prairie Creek and northwesterly of South Prairie-Carbon River County Road, *excepting therefrom right-of-way of the Burlington Northern (formerly Northern Pacific) Railway Company.*
>
> Parcel B: That portion of the southeast quarter of the northeast quarter of Section 27, Township 19 North, Range 5 East of the W.M., Pierce County, Washington, which lies southeasterly of the southeasterly margin of State Route 162 (Pioneer Way) and northwesterly of South Prairie Carbon River County Road, *excepting therefrom right-of-way of the Burlington Northern (formerly Northern Pacific) Railway Company.* Situate in Pierce County, Washington. (C.P. 246, emphasis supplied).

The legal description included in the deed was prepared at Winkelman's order by John Becker, a licensed surveyor (C.P. at 266 and 268). Mr. Becker was not instructed to except a fee interest in the property underlying a former railroad right-of-way from the terms of the conveyance. Had he been so instructed he would have used other language (C.P. at 267).

The former railroad right-of-way was abandoned by the Burlington Northern Railroad prior to the sale to Harris (R.P. 30). At the time of the conveyance to Harris, however, Winkelman did not know that there was an abandonment or that they owned any interest in the disputed property (Brief of Appellant at 18). Harris knew that the ICC had authorized the abandonment at the time of the sale. She attempted to determine the significance of this authorization by correspondence with the ICC and Pierce County (C.P. 247-250). Harris discussed the railroad's interest in the disputed property with McGowan on several occasions before the closing of the sale (C.P. 263).

On February 24, 1988, Ski Park paid Winkelman $250.00 for a Quit Claim Deed purporting to convey Winkelman's interest in the disputed property and in other property formerly subject to a railroad right-of-way.

The Quit Claim Deed of February 24, 1988, is the sole basis upon which Ski Park asserts title to the disputed property (C.P. 181-213, C.P. 276, and Brief of Appellant).

B. Procedural Background

Harris filed a complaint to quiet title to property formerly subject to a railroad right-of-way on February 27, 1987 (C.P. 1-96). On September 11, 1987, Harris amended her complaint to include claims to the disputed property and recorded a Lis Pendens disclosing this action under #8709110334 (C.P. 251).

Ski Park brought a Motion for Summary Judgment to quiet title to the property described in the February 24,

1988 Quit Claim Deed. Harris filed a Cross-Motion for Summary Judgment to that property formerly subject to a railroad right-of-way in the southeast of the northeast of Section 27, Township 19 North, Range 5 East of the W.M. as conveyed to her by Winkelman in the October 29, 1987 Warranty Deed.

On July 5, 1988, Judge Morrison of the Pierce County Superior Court denied both Motions for Summary Judgment and ruled that the matter presented factual questions inappropriate for resolution at summary judgment (R.P. 63-64). Ski Park filed a motion for reconsideration of the court's ruling. Harris subsequently filed a similar motion. The court heard these motions on July 22, 1988. At that time counsel for both parties stipulated that there were no genuine issues of material fact and that the court had before it all facts that might be presented at trial (R.P. 96-108). Based upon this stipulation the court granted Harris's motion and quieted title in the disputed property to Harris. Ski Park filed a further motion for reconsideration of the court's decision on August 17, 1988. This motion was denied (C.P. at 317-319). On September 7, 1988, the court entered written Findings of Fact and Conclusions of Law in support of a judgment quieting title to the disputed property in favor of Harris. Ski Park's appeal followed that judgment.

III. – SUMMARY OF ARGUMENT

The parties stipulated in open court that there were no facts in dispute and that all facts that could be presented at trial were then before the court. Based on this stipulation the court ruled in favor of Harris as a matter

of law. Therefore the function of the appellate court is to ascertain whether the Findings of Fact support the Conclusions of Law entered by the lower court. The appellate court should not to engage in a de novo inquiry into the facts.

The court found that the legal description of the October 29, 1987 deed to Harris was ambiguous with respect to the meaning of the clause excepting therefrom right-of-way. The court looked beyond the four corners of the deed to determine the intent of the parties. The court focused on the legal description attached to the Earnest Money Purchase and Sale Agreement as the best evidence of the intent of the parties to except only an easement from the terms of the conveyance and quieted title to Harris. This conclusion was supported by substantial evidence in the record and should not be disturbed on appeal.

IV. – LAW AND ARGUMENT

A. The Parties Stipulated That the Facts Were Not in Dispute

Ordinarily, an appellate court reviewing an order granting summary judgment will engage in the same inquiry as the trial court. This involves a determination of whether there are any genuine issues of material fact that would render the case inappropriate for summary judgment. If no issue of fact is found the court views the facts in the light most favorable to the non-moving party and determines whether judgment is proper as a matter of law. *Reese v. Sears*, 107 Wn.2d 563, 731 P.2d 497 (1987). In these situations the appellate court will generally regard

any Findings of Fact and Conclusions of Law entered by the lower court as surplusage. *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 586 P.2d 680 (1978). In this case, however, the parties stipulated that there were no disputed issues of fact, and that the court had all the facts before it that could be presented at trial and twice moved for a summary resolution of the case. Under these circumstances it is appropriate for the appellate court to determine whether, given the stipulated facts presented to the lower court, the courts decision was supported in law. *Morgan v. Prudential Insurance Co.*, 86 Wn.2d 432, 545 P.2d 1193 (1976).

B. The Stipulation of the Parties is Binding.

Civil Rule 2A is the rule governing the binding effect of oral stipulations. The rule provides that an oral stipulation is binding when made and assented to in open court before a court reporter. The transcript of the hearing before Judge Morrison on July 22, 1988, includes the following:

> COURT: Is there any factual data that would be presented at the trial of this case that is not now before this Court? (R.P. 96)
>
> GAUTHIER (for Ski Park): [No] other than just additional verbiage on the same issues. (R.P. 96)
>
> COURT: Do you think there are any facts that are material to the resolution of this issue that are not now before this Court?
>
> COMBS (for Harris): No I do not your honor. (R.P. 97)
>
> COURT: Anything further?

> GAUTHIER: Your honor I would agree that, you know, the facts are not in dispute . . . the facts before the court, you know, are very clearly what the understandings of the parties were . . . and those would be the facts, your honor, that the case should be decided. (R.P. 99)
>
> COURT: Now I have relied upon the representations of both counsel that all the material facts in this case are before the Court or I would not have decided the case on summary judgment. (R.P. 108)

The above-language satisfies the requirements of CR2A for oral stipulations. Stipulations and agreements of counsel are viewed with favor. *Smythe & Worldwide Movers, Inc. v. Whitney,* 6 Wn.App 176, 491 P.2d 1356 (1971). When the parties have knowingly entered into stipulations, a trial court's reliance upon the stipulation will not be disturbed on appeal. *Baird v. Baird,* 6 Wn.App 587, 444 P.2d 1387 (1972).

In the present case, there is an element that changes the scope of inquiry. Instead of mere allegations that the facts were not in dispute there is a binding agreement to that effect. Stipulations to facts in a summary judgment motion are binding on the parties for the purposes of subsequent proceedings. *Woods v. Gott,* (U.S.D.C. Del. 1950) 92 F.Supp 325.

It is important to emphasize that the lower court first denied both parties' motions for summary judgment (R.P. 56). The court only consented to decide the case without trial after both sides stipulated in open court that all facts were before the court and not in dispute. The parties may not now argue that the matter was inappropriate for

summary judgment and this court should limit the scope of review to errors of law.

C. The Findings of Fact and Conclusions of Law.

Because this matter was decided after the parties stipulated to facts the function of the appellate court is to apply the facts as found below and determine whether those facts support the conclusions of law entered by the court. *See: Morgan v. Prudential Insurance Co., supra.* It is important to review exactly what the lower court decided. The court found:

1. That the language of exception of the right-of-way in the warranty deed from Winkelman to Harris was ambiguous with respect to the nature of the property interest excepted from the terms of the deed. *Finding of Fact,* 1.14. (C.P. 349).

2. That the legal description of the Earnest Money Purchase and Sale Agreement disclosed the mutual intent of the parties that only an easement was excepted from the conveyance if any easement then existed. *Findings of Fact,* 1.10, 1.11 and 1.15 (C.P. 349 and 350).

3. That the ambiguous language of the deed was interpreted to include the conveyance of the underlying fee of certain land formerly subject to a railroad right-of-way. *Findings of Fact,* 1.20 (C.P. 350).

The court based its interpretation of the deed language upon, and found evidence of the parties intent in, the language of the legal description attached to and made part of the Earnest Money Purchase and Sale Agreement of July 24, 1987. The court did not reform the

deed but merely interpreted ambiguous language. *Conclusion of Law,* 2.6, (C.P. 352).

D. This Case is Controlled by Principles of Deed Construction.

Despite the many complex legal arguments raised by both sides in this controversy, in the final analysis the dispute boils down to a simple matter of deed construction. Construction of deeds is a matter of law for the court. *Thomas v. Nelson,* 35 Wn.App 868, 670 P.2d 682 (1983) and *State Bank v. Phillips,* 11 Wn.2d 483, 119 P.2d 664 (1941). In construing a deed a court must carry out the real intent of the parties and give meaning to each word of the deed if reasonably possible. Where a deed may be construed in more than one way it must be interpreted most favorably to the grantee and most strictly against the grantor. *Hodgins v. State,* 9 Wn.App 486, 513 P.2d 304 (1973) and *Carr v. B.N.R.R.,* 23 Wn.App 386, 597 P.2d 409 (1979). The duty of the court is to ascertain not what the parties may have secretly intended, but rather, the meaning of the words used. The court must find the true sense of the written words as the parties used them and then subject the instrument, in its operation, to established rules of law. *Vavrek v. Parks,* 6 Wn.App 684, 495 P.2d 1051 (1972).

In this case the court found that the deed was capable of more than one construction and that the language of the legal description was ambiguous (R.P. 103). The rule in Washington is that if an ambiguity is found, the situation and circumstances of the parties existing at the time of the grant are to be considered. *Zobrist v. Culp,* 95

Wn.2d 556, 627 P.2d 1308 (1981). To ascertain the intention of the parties, separate deeds or instruments executed as parts of substantially one transaction may be taken together and construed as one instrument. *Standring v. Mooney,* 14 Wn.2d 220, 127 P.2d 401 (1942). If two documents relating to the sale of real property are part of the same transaction they should be construed together in determining the intention of the parties. Parol evidence is admissable to show the intent of the parties when an instrument contains an ambiguity and to show the circumstances under which instruments were executed. *Lemen v. Pring Corp.,* 4 Wn.App 462, 482 P.2d 802 (1971).

E. Substantial Evidence Supports the Lower Court's Decision

1. The Exception language Was Ambiguous.

Blacks Law Dictionary defines ambiguous language as that which is reasonably capable of being understood in more than one sense. The parties agree and have cited considerable authority from this and other jurisdictions that the clause "excepting therefrom right-of-way" has more than one reasonably understood meaning. (*See*: Brief of Appellant; *and see*: Plaintiff's Memorandum in Support of Cross-Motion for Summary Judgment C.P. 225-228).

Harris maintains the language refers to easement rights of the railroad. Ski Park contends that the language was intended to except a fee interest. The court found that Harris's interpretation of the language was the more appropriate one because the legal description in the Earnest Money Purchase and Sale Agreement contained the

words "excepting the right-of-way easement" (R.P 103-104). The court found that Winkelman acknowledged this description and that there was no evidence to support a modification of the understanding of the parties found in the Earnest Money Purchase and Sale Agreement (R.P. 104).

2. The Merger Doctrine is Inapplicable.

In general, the merger doctrine provides that a deed made in full execution of a contract of sale of land merges the provisions of the contract into the deed, including all prior negotiations leading up to the execution of the deed. The rule is subject to the exception that the question of merger is one of construction to be gathered from a consideration of the instruments. *Davis v. Lee,* 52 Wn. 330, 100 P. 752 (1909) and *Black v. Evergreen Land Developers,* 75 Wn.2d 241, 450 P.2d 470 (1969).

Ski Park's argument for the application of the merger doctrine must fail. The court did not rule that the Earnest Money Purchase and Sale Agreement superseded the deed, as Ski Park contends. The language of the deed was admittedly capable of more than one interpretation. The court simply found evidence of the parties' intended meaning and applied it to interpret the ambiguous deed.

The legal description in the Earnest Money Purchase and Sale Agreement is not inconsistent with the description in the Warranty Deed. The two documents are not mutually exclusive. The former document serves to explain, interpret and construe the latter.

3. The Earnest Money Purchase and Sale Agreement Disclosed the Mutual Intent of the Parties That Only an Easement Was Excepted.

Harris's intent to exclude an easement was found in several ways: (a) She used the word easement in the legal description; (b) She filed a Lis Pendens including the disputed property, thus providing actual or constructive notice to the seller that she intended to acquire the property. (*See*: Harris Declaration and Title Report, C.P. 261-265, C.P. 252 and R.P. 129-131); and (c) She discussed the former right-of-way with the seller's agent (Harris Declaration, C.P. 263).

Support for Winkelman's intent to exclude only an easement was found as follows: (a) Winkelman signed and approved the legal description in the Earnest Money Purchase and Sale Agreement (containing the word "easement") (C.P. 242-244); (b) Winkelman never directed their agent, the surveyor John Becker, to except the underlying fee from the terms of the conveyance. Had he been so instructed he would have used different language (R.P. 102-103 and Becker Declaration, C.P. 266-268); (c) Winkelman did not know that the former right-of-way had been abandoned or that they owned any interest in the former right-of-way at the time of the sale. (*See*: Brief of Appellant at 18) One cannot intend to except or reserve what one does not know one owns; and (d) The language of exception in the Warranty Deed to Harris is consistent with language of exception in prior conveyances within the chain of title. (C.P. 226 and 238-241) If, as Ski Park contends, the language of exception in the deed from Sabin to Winkelman did not except a fee interest, then

virtually identical language in the Winkelman to Harris deed did not do so either.

4. The Trial Court Did Not Reform the Deed.

Ski Park argues that the trial court reformed the deed by adding the word "easement" (Brief of Appellant at 25). The court was very clear that it did not reform any documents but simply interpreted ambiguous language (R.P. 117 and 118). The court based its interpretation of the ambiguity on the absence of any evidence of intent to modify the terms of the Earnest Money Purchase and Sale Agreement. (R.P. 104; and *see*: Earnest Money Purchase and Sale Agreement, Paragraph 18, C.P. 243 "All modifications shall be in writing.") The Earnest Money Purchase and Sale Agreement and the Warranty Deed are clearly documents relating to the sale of real property and are part of the same transaction. By its terms the Earnest Money Purchase and Sale Agreement contemplates the deed. The law in Washington supports the court's action in construing the two documents together in order to determine the intention of the parties. *Standring v. Mooney, supra,* and *Lemen v. Pring, supra.*

F. All of the Evidence Contemporaneous to the Sale Supports the Lower Court's Interpretation.

Ski Park argues that the parties could not have intended to except an easement because no easement existed at the time of the conveyance (*See*: Brief of Appellant, at 9). While it is agreed that Winkelman owned the fee interest in the property formerly subject to a railroad

right-of-way, the parties did not know that at the time of the sale. Ski Park acknowledges this (*See*: Brief of Appellant at 18). The title report, ordered by Winkelman, disclosed that the railroad apparently had continuing rights in the property at the time of the sale (*See*: Exception 5 in Title Report, C.P. 252). The railroad was paying real property taxes on the disputed property at that time (R.P. 97). The railroad was still a party defendant in the quiet title action involving the property and did not disclaim its interest until December, 1987. The court found that "[Winkelman] would not want to warrant title to the fee without excepting the easement even though they had some reason to believe that the easement may well be or have been abandoned" (R.P. 103).

Ski Park now argues that Winkelman intended something other than the exception of an easement. Under deed construction principles, however, the duty of the court is to ascertain not what the parties may have secretly intended but what is the meaning of the words used. *Vavrek v. Parks, supra.* This is what Judge Morrison did and his conclusion is supported by the evidence and stipulated facts before him.

G. The Lower Court's Interpretation of the Deed Does Not Render the Deed Exception Meaningless.

Ski Park argues that the lower court's interpretation is meaningless because the deed exception was intended to withhold some interest. Harris agrees that something was withheld, namely whatever rights the railroad might still have in the property. The title report contained an

exception for continuing interests of the railroad and the railroad still claimed an interest in the property. Although the railroad later turned out not to have any interest in the property this does not change the fact that the parties reasonably believed otherwise at the time of the conveyance.

H. The Lower Court's Interpretation of the Exception Does Not Render the Clause Nonsensical

Ski Park's contention is that the lower court's interpretation is nonsensical because the railroad had always owned the land in fee. This is not true. Ski Park refers to decisions describing the interest held by a railroad in right-of-way land pursuant to the Northern Pacific Land Grant Act of 1864, ch. 217, 13 Stat. 365 (1864) as a limited fee on an implied condition of reverter (*See*: Defendant's Memo in Support of Motion for Summary Judgment, C.P. 181-213). The limited fee designation was applied to land acquired pursuant to Section 2 of the Northern Pacific Land Grant Act of 1864. But here, the railroad acquired its interest pursuant to Section 3 of the 1864 Act (*See*: Page 2 of Plaintiff's Memorandum in Support of Motion for Summary Judgment, C.P. 226).

Pursuant to the Act of 1864, when the railroad selected land under Section 3, as here, it acquired fee simple title to the entire subdivision. *See: H.A. & L.D. Holland Co. v. N.P.R.R.*, (9th Circuit 1914) 214 F. 920.

After obtaining fee title N.P.R.R. conveyed the subdivision here in question to Samuel Wilkeson in 1876. The conveyance to Wilkeson contained a reservation and exception of "a strip of land 200 feet wide . . . to be used

for a right-of-way or for other railroad purposes" (C.P. 238-240). Washington courts have construed this type of deed language to reserve and except only an easement in favor of the railroad that terminates upon abandonment. *Swan v. O'Leary,* 37 Wn.2d 533, 255 P.2d 199 (1950) and *Lawson v. State,* 107 Wn.2d 444, 730 P.2d 1308 (1986). Therefore following the conveyance to Wilkeson in 1876, all the railroad had left was an easement for railroad purposes. The lower court's interpretation not only makes sense, but more accurately reflects the interest that the railroad had in the disputed property.

I. The Fact That Other Deed Language Could Have Been Used Supports the Lower Court's Interpretation

Ski Park argues that it would have been possible to draft language more clearly defining what the parties meant by the words "excepting therefrom right-of-way". It was Winkelman's agent, however, who prepared the problematic language. If Winkelman intended to except a fee interest they could have said so. As the court pointed out "if [different language was used] there would not be an issue in this case. There would be no ambiguity" (R.P. 104). The deed language must be construed most strictly against the grantor (Winkelman) and in favor of the grantee (Harris). *See: Carr v. B.N.R.R., supra.*

Harris did not take a deed excepting the very property she intended to acquire, as Ski Park maintains. She took a deed that recognized the possibility of a continuing interest in the railroad. Ski Park's analogy to "keys in a pocket" is inappropriate because the word "keys" only

has one commonly understood meaning (Brief of Appellants at 13). The words "right-of-way" have several. Ski Park ignores the question of the intent of the parties that has lead to this litigation.

J. The Lower Court's Interpretation is not Inconsistent With the Term "Excepting" in the Deed.

Ski Park argues that exception language is used only when the interest withheld existed at the time of the deed. The language in the deed was "excepting therefrom right-of-way *of the Burlington Northern Railroad*" (emphasis supplied). The railroad had abandoned the former right-of-way at the time of the conveyance. Therefore no right-of-way of the Burlington Northern Railroad existed on the date of the conveyance, whether the railroad's interest was formerly fee or easement. The problem here was that the parties did not know the nature of the railroad's interest or that it was extinguished at the time of the conveyance (Brief of Appellant at 18). If the railroad had any interest in the disputed property, the exception language in the deed was effective to recognize that interest.

V. CONCLUSION

This case presents a classic deed interpretation/construction problem. The question before the lower court was the intent of the parties to the October 29, 1987 deed to Harris in using the words "excepting therefrom right-of-way of the Burlington Northern Railroad". The parties to this appeal agree that there is ample authority that the quoted language alone might have been effective to

except an easement or a fee. Their acknowledgment establishes that the lower court correctly ruled that the deed was ambiguous. The ambiguous deed language must be construed most favorably to the grantee and against the grantor.

The parties stipulated that all of the facts that could be presented at trial were before the court and were not in dispute. Based upon the stipulated facts the court found that an exception of an easement was intended. The court's finding was supported by substantial evidence. The key evidence was the language of the Earnest Money Purchase and Sale Agreement which contained the clause "excepting the B.N.R.R. easement".

Ski Park has sought to cloud the issue with irrelevant and specious arguments. Ski Park urges the court to consider Harris's membership in an organization opposed to the establishment of a recreational trail as dispositive of some legal issue involved in this case. That argument is clearly without merit.

All of the equities in this case support the lower court's decision. Harris disclosed her intent to acquire the underlying fee to the disputed property. The sellers employed a real estate broker, land surveyor and title company to represent them. None of those agents of the seller indicates that the seller expressed an intent to except a fee interest from the conveyance. Winkelman admits that they did not know they owned any interest in the disputed property. Despite this, Ski Park inexplicably urges this court to find that Winkelman intended to except a fee interest in the former railroad right-of-way land.

The trial court acted properly in interpreting the exception language in favor of Harris. The trial court neither reformed nor changed the deed language, it only explained what the deed meant based on substantial evidence and well recognized principles of deed interpretation. This Court should affirm the decision of the trial court and dismiss this appeal.

Dated this 24th day of April, 1989.

Respectfully Submitted,

SAMPSON WILSON & COMBS, INC., P.S.

/s/ Donald A. Kellman
Loren D. Combs
Donald A. Kellman
Attorneys for Respondent Harris

No. 12321-5

IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON DIVISION II

MARY E. HARRIS

Respondent,

v.

SKI PARK FARMS, INC.

Appellant.

REPLY BRIEF OF APPELLANT

(Filed June 23, 1989)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. CLARIFICATION OF FACTS 1

II. ARGUMENT 4

A. THE SUMMARY JUDGMENT STANDARD OF REVIEW IS APPLICABLE TO THE TRIAL COURT'S RULING DESPITE THE EXISTENCE OF FINDINGS OF FACT AND CONCLUSIONS OF LAW 4

1. Findings and Conclusions Entered with a Summary Judgment Order are Superfluous and Must be Disregarded 5

2. The Parties' Alleged Stipulation Does not Affect the Summery Judgment Standard of Review 7

a. Evidence of Stipulation 8

b. Stipulations and Summary Judgment 9

B. THE TRIAL COURT IMPROPERLY RELIED ON "FULL BLOWN" EXTRINSIC EVIDENCE AND ON THE MERGED LANGUAGE OF THE EARNEST MONEY AGREEMENT 14

1. Reliance on Affidavits and Similar Extrinsic Evidence is Inappropriate Because the Surrounding Circumstances Eliminate any Ambiguity in the Deed Language 15

2. The Merger Doctrine Precludes the Trial Court's Reliance on the Earnest Money Agreement 18

III. CONCLUSION 21

TABLE OF AUTHORITIES

Black v. Evergreen Land Developers, Inc., 75 Wn.2d 241, 450 P.2d 470 (1969) 19

Chelan County Deputy Sheriffs' Assoc. v. County of Chelan, 109 Wn.2d 282, 745 P.2d 1 (1987)..... 6

Del Guzzi Const. Co. v. Global Northwest Ltd., 105 Wn.2d 878, 719 P.2d 120 (1986) 4

Dodd v. Gregory, 34 Wn. App. 638, 663 P.2d 161 (1983) 5, 6

Donald v. City of Vancouver, 43 Wn. App. 880, 719 P.2d 966 (1986) 5

Duckworth v. City of Bonney Lake, 91 Wn.2d 19, 586 P.2d 860 (1978) 5, 6

Folsom v. County of Spokane, 111 Wn.2d 256, 759 P.2d 1196 (1988) 13

Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985) 4

Queen City Savings & Loan Assoc. v. Mecham, 14 Wn. App. 470, 543 P.2d 355 (1975)..... 16

Roeder Co. v. Burlington Northern, Inc., 105 Wn.2d 269, 714 P.2d 1170 (1986) 15

Rusan's, Inc. v. State, 78 Wn.2d 601, 478 P.2d 724 (1970) 13

Snyder v. Roberts, 45 Wn.2d 865, 278 P.2d 348 (1955) 19

Standring v. Mooney, 14 Wn.2d 220, 127 P.2d 401 (1942) 19

State ex rel. Zempel v. Twitchell, 59 Wn.2d 419, 367 P.2d 985 (1962) 7

Washington Optometric Assoc., Inc. v. County of Pierce, 73 Wn.2d 445, 438 P.2d 861 (1968) 6

Zobrist v. Culp, 95 Wn.2d 556, 627 P.2d 1308 (1981) 15, 16

I. CLARIFICATION OF FACTS

Both parties already have submitted lengthy statements of facts in their primary briefs, and Ski Park does not want to overburden the court by adding to the volume of factual information in this reply brief. Therefore, Ski Park will rely upon the accuracy of its original statement of facts rather than engaging in a point-by-point response to Harris' counterstatement of facts. Because of the importance of understanding the layout of the property at issue, however, Ski Park is compelled to clarify Harris' characterization of the various parcels.

The map attached to Respondent's brief as Exhibit "A", together with Harris' statement of the facts, is extremely misleading. Essentially, Harris suggests that she acquired two large parcels of property that surround the railroad right of way (including the right of way property at issue in this case). An analysis of the property descriptions, however, discloses that Harris only acquired three small parcels and that the property she acquired does not even adjoin the disputed property.

The Parcel A described in the Winkelman deed consists of all property in a certain quarter lying southeast of South Prairie Creek and northwest of the South Prairie/ Carbon River County Road, except the railroad right of way. Apart from the right of way, the property consists of two small parcels – one .21 acres in size and one 1.3 acres. Only if Harris also owns the abandoned right of way (which is not at issue in this litigation) are the two small pieces of land joined into one large parcel, as depicted in Exhibit "A" to respondent's brief.

Similarly, the Parcel B described in the Winkelman deed consists of the property in a certain quarter southeast of SR 162 and northwest of the South Prairie/Carbon River County Road, except the railroad right of way. Once again, Exhibit "A" to respondent's brief suggests that Harris purchased a large parcel from Winkelman. Instead, apart from the right of way, Winkelman only acquired a small .6-acre parcel in the northeast corner of the section. Significantly, the right of way property that Harris now claims continues for another 3,000 feet (over one-half mile) to the southwest of Harris' property.

As stated above, Harris' title to the right of way is not disputed, at least in this litigation, in areas where Harris' property adjoins the right of way. The dispute involves the right of way property that extends far beyond Harris' property and has no connection with that property. A map that helps identify the various parcels at issue is attached as an exhibit to this reply brief.

II. ARGUMENT

A. THE SUMMARY JUDGMENT STANDARD OF REVIEW IS APPLICABLE TO THE TRIAL COURT'S RULING DESPITE THE EXISTENCE OF FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The standard of review for summary judgment orders is well known. Summary judgment is appropriate "if the pleadings, depositions . . . and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hartley*

v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). On review, the appellate court places itself in the position of a trial court, assuming all facts most favorable to the nonmoving party. *Del Guzzi Const. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986).

In the proceedings below, the trial court granted summary judgment in favor of Harris and entered an order granting summary judgment. (CP 344). Nevertheless, Harris argues that the summary judgment standard of review is inapplicable in this case because the court also entered findings of fact and conclusions of law. Harris claims that this court must ignore the summary judgment order and submit the findings and conclusions to the deferential "substantial evidence" standard of review. This position is misguided. Under no circumstances can the trial court or the parties undermine the appellate court's summary judgment standard of review.

1. Findings and Conclusions Entered with a Summary Judgment Order are Superfluous and Must be Disregarded.

Harris' reliance on the trial court's findings of fact and conclusions of law are misplaced. Washington courts repeatedly have emphasized that findings of fact and conclusions of law entered in the course of a summary judgment are superfluous and cannot be considered on appeal. *See, e.g., Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978); *Donald v. City of Vancouver*, 43 Wn. App. 880, 883, 719 P.2d 966 (1986); *Dodd v. Gregory*, 34 Wn. App. 638, 641, 663 P.2d 161 (1983).

Similarly, the failure to assign error to summary judgment findings and conclusions has no effect on the case. *See, e.g., Chelan County Deputy Sheriffs' Assoc. v. County of Chelan*, 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1987); *Washington Optometric Assoc., Inc. v. County of Pierce*, 73 Wn.2d 445, 448, 438 P.2d 861 (1968). As a result, findings and conclusions do not affect the standard for reviewing summary judgment orders. *See Sheriffs' Assoc.*, 109 Wn.2d at 294.[1]

The rationale behind this rule is apparent. The moving party's burden in a summary judgment proceeding is to prove by *uncontroverted* facts that he is entitled to judgment as a matter of law. By definition, summary judgment is not appropriate if the trial court must "find" facts in order to support the ruling. The court in *Duckworth* aptly summarized this position:

> The function of a summary judgment proceeding is to *determine whether a genuine issue of material fact exists.* It is *not,* as appears to have happened here, *to resolve issues of fact or to arrive at conclusions based thereon.*

91 Wn.2d at 21 (emphasis in original). *See also State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 425, 367 P.2d 985 (1962) ("The function of a summary judgment proceeding . . . is to determine whether or not a genuine issue of fact exists, not to determine issues of fact").

In this case, the trial court improperly (or at least needlessly) entered findings of fact and conclusions of

---

[1] Despite her sweeping arguments, Harris has produced no authority to support her position that findings and conclusions can be considered in a summary judgment appeal.

law along with its summary judgment order. Because the case was decided on summary judgment, these findings and conclusions have no weight on appeal. This court's only function is to judge the trial court's decision under the summary judgment standard of review - determining whether either party is entitled to judgment as a matter of law based on uncontroverted facts.

2. The Parties' Alleged Stipulation Does Not Affect the Summary Judgment Standard of Review.

Harris claims that Ski Park's attorney entered into stipulations that somehow validated the findings of fact and conclusions of law, thereby compelling a substantial evidence standard of review. This argument must be rejected for two reasons. First, the trial court transcript does not support Harris' stipulation claim. Second, even if the parties made such a stipulation, the law of summary judgment would render it meaningless.

a. Evidence of Stipulation

Harris' "evidence" of a stipulation is limited at best. Her appellate brief quotes three exchanges between the court and the two attorneys: Ski Park's attorney stating that all factual data had been presented to the court (RP 96), Harris' attorney stating that all material facts were before the court (RP 97), and Ski Park's attorney stating that the facts were not in dispute (PR 99). The brief also quotes the court's statement that he would not have granted summary judgment but for the representations

that all material facts had been submitted. (RP 108). Based on these passages, Harris claims the parties stipulated that (1) all material facts had been presented to the court, and (2) the facts were not in dispute.

CR 2A states that stipulations are binding on the parties only if "made and assented to in open court." This implies some clear, unambiguous and certain statement to the court setting forth the specific matters subject to the stipulation and expressly acknowledging the stipulation. The record in this case, however, hardly constitutes a firm and definite acknowledgment. The Ski Park trial attorney simply made two short responses to questions from the court in the course of his argument. He did not delineate the scope or nature of the alleged stipulations, nor were any "formalities" recognized. Under these circumstances, fairness dictates that mere passing comments not be elevated to the level of formal stipulations.

b. Stipulations and Summary Judgment

Even if Ski Park made the alleged stipulations, the nature of summary judgment proceedings preclude them from having any impact on the efficacy of the court's findings and conclusions or on the standard of review. The alleged stipulation that all material facts were before the court seems to be the more important stipulation from the court's standpoint. In granting summary judgment, the court expressly "relied upon the representations of both counsel that all the material facts in this case are before the Court." (RP 108).

Despite the court's reliance, this alleged stipulation is meaningless in a summary judgment context. Assumably, all material facts are presented to the court in *every* summary judgment motion – the attorneys have an obligation to do so. The fact that the court has considered all material facts has no bearing on whether a genuine issue of material fact exists. In addition, the fact that some material fact has not been presented does not preclude summary judgment. The court's only obligation is to make the summary judgment determination based on the pleadings, affidavits, and other materials submitted to him. Therefore, the alleged stipulation necessarily could have no effect on the court's ruling.

The nature of summary judgment motions also renders ineffective the alleged stipulation that the facts were undisputed. This alleged stipulation is meaningless for three primary reasons. First, even if both parties stated that the material facts were undisputed, they did not agree on which facts were material. Unless the motion is frivolous, *every* attorney bringing a summary judgment motion must argue and believe that the material facts are not in dispute. Such an argument suggests only that the facts material to *that party's* motion are undisputed. It does not constitute an agreement that the facts material to the opposing party's cross-motion for summary judgment also are undisputed. The parties may simply disagree as to which facts are material.

The positions of the parties in this case constitute a classic example of this principle. Both parties agree that the "operative" facts – transactions, dates, and documents – are undisputed. Beyond these basic facts, Ski

Park believes that the only key material fact is Winkelman's fee ownership of the right of way property. That fact alone indicates that Winkelman excepted a fee interest in the right of way in the deed to Harris. Conversely, Harris relies on a long list of material facts to support her position. As a result, Ski Park's argument that the material facts are undisputed refers only to *its* understanding of the facts that are material, not to Harris' material facts.

Second, and along the same lines, the alleged stipulation is meaningless because the parties did not identify the specific facts to which they were stipulating. In the typical case, the parties actually prepare a detailed stipulation of facts, which a trial court then adopts as part of its summary judgment ruling. No findings of fact are required. In this case, however, some of the facts were controverted despite the parties alleged stipulation. As a result, the court actually was forced to resolve factual issues and execute findings of fact. This violated the principles of summary judgment law stated above, and therefore renders ineffective the alleged attempted stipulation.

Harris would have had a valid argument if Ski Park had stipulated to the validity of the findings of fact and conclusions of law themselves. However, Ski Park did not do so. At the most, it agreed only that "the facts are not in dispute." (CP 99).

Finally, Harris' argument must fail because as a matter of law, the parties cannot enter into a general stipulation that no material issues of fact exist for summary judgment purposes. The determination as to genuine

issues of fact in a summary judgment context is a question of law for the trial court. The well-settled rule is that the parties' stipulation is not dispositive as to legal issues. *See, e.g., Folsom v. County of Spokane,* 111 Wn.2d 256, 262-63, 759 P.2d 1196 (1988); *Rusan's, Inc. v. State,* 78 Wn.2d 601, 606, 478 P.2d 724 (1970). Once again, the parties could have prepared a stipulation of facts for the court to adopt. However, by simply "agreeing" that no material issues of fact existed the parties improperly invaded the province of the trial court.

All three of these arguments are closely related to the rules concerning the summary judgment standard of review discussed above. The courts will not stray from the principle that summary judgment can only be based on uncontroverted material facts. On review, the trial court's attempt to resolve factual issues or to support its holding with findings of fact and conclusions of law automatically are disregarded. The appellate court's only function is to examine the evidence before the trial court, determine whether genuine issues of material fact exist, and determine whether either party is entitled to judgment as a matter of law based on undisputed material facts.

B. THE TRIAL COURT IMPROPERLY RELIED ON "FULL BLOWN" EXTRINSIC EVIDENCE AND ON THE MERGED LANGUAGE OF THE EARNEST MONEY AGREEMENT.

Although Harris' brief rambles on for several pages, she simply restates the same argument over and over –

that the deed language is ambiguous and must be construed in her favor. This argument is ineffective, however, because Harris improperly relies on "full blown" extrinsic evidence (i.e., affidavits and declarations) in an attempt to create an ambiguity. Because the deed language read in conjunction with the surrounding circumstances is not ambiguous, use of parol evidence to create an ambiguity is inappropriate.

Similarly, Harris' attempt to use the language of the earnest money agreement to create an ambiguity in the deed language is misguided. The merger doctrine expressly excludes evidence of prior agreements in deed interpretation cases.

1. Reliance on Affidavits and Similar Extrinsic Evidence is Inappropriate Because the Surrounding Circumstances Eliminate any Ambiguity in the Deed Language.

Analyzing Harris' position requires an understanding of the proper use of extrinsic evidence in deed construction cases. In construing deed language (and other contract language), courts essentially have developed a three-stage approach. First, the court looks to the language of the deed standing alone in order to ascertain the intent of the parties. If the language itself is unambiguous, the analysis stops and the court gives effect to that language. If not, the court may consider extrinsic evidence. *See Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 269, 276, 714 P.2d 1170 (1986).

Analysis of the cases indicate that the consideration of extrinsic evidence involves two additional stages. In

the second stage, the court will consider "limited" extrinsic evidence in order to understand "the situation and circumstances of the parties existing at the time of the grant." *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981); *Queen City Savings & Loan Assoc. v. Mecham*, 14 Wn. App. 470, 474-75, 543 P.2d 355 (1975). In this case, such evidence includes the location of the various parcels, the basic facts surrounding the sale transaction, the right of way abandonment and reversion to Winkelman, the size of Harris' parcel in relation to the size of the property she is attempting to claim, and Harris' opposition to the Rails-to-Trails project. Such evidence allows the trial court to get a "feel" for the circumstances surrounding the transaction. As with the first stage, if the deed language is unambiguous when read in the context of the surrounding circumstances, the court's analysis ends and it must enforce the language as written.

The third stage is the interpretation of "full blown" parol evidence. The court reaches this stage only if it cannot interpret the deed as a matter of law based on the language and the surrounding circumstances. This parol evidence is *not* automatically considered simply because the language remains ambiguous after stage one.

In this case, the trial court relied on affidavits and similar extrinsic evidence to create an ambiguity in the deed. Under a proper analysis, however, the court should have stopped after stage two and should not have considered full blown extrinsic evidence. Evidence of the circumstances surrounding the transaction, most importantly Winkelman's fee ownership in the right of way, eliminated any ambiguity in the deed language standing alone. (The full discussion supporting this conclusion is presented in Ski Park's prior brief

and will not be repeated here.) As a result, affidavits and related evidence could not be used to create an ambiguity where none existed.

Significantly, summary judgment is still inappropriate even if the trial court properly considered "stage three" evidence. The affidavits conflicted on several key issues, such as Winkelman's intent. In addition, the trial court drew several inferences in favor of Harris to support his ruling when he was required to read the affidavits in the light most favorable to Ski Park. In short, if Ski Park is not entitled to judgment as a matter of law based on the deed language and the surrounding circumstances, this case must be remanded for a trial to resolve the factual issues created by the full blown extrinsic evidence.

2. The Merger Doctrine Precludes the Trial Court's Reliance on the Earnest Money Agreement.

Both parties concede that the language of the deed exception clause differs from the language of the same clause in the prior earnest money agreement: the earnest money agreement refers to "right of way *easement*" while the deed refers to "right of way". Harris repeatedly argues that the language of the earnest money agreement should control over the deed language, and the trial court essentially reformed the deed language based on that argument.[2] This argument must be rejected, however, because it violates the well-settled merger doctrine.

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[2] Harris strenuously denies that the trial court reformed the deed, and the court's order as executed does not mention reformation. It is interesting to note, however, that both parties

The general rule in Washington is that the provisions of a real estate contract and sale agreement and all other prior negotiations and agreements merge into a deed made in execution of the contract of sale. *See, e.g., Black v. Evergreen Land Developers, Inc.*, 75 Wn.2d 241, 248, 450 P.2d 470 (1969). The entire purpose of the doctrine is to provide finality, recognizing that the understandings and agreements between the parties may change in the course of negotiations. *See Snyder v. Roberts*, 45 Wn.2d 865, 871, 278 P.2d 348 (1955). Under this doctrine, an agreement that is superseded by a subsequent agreement cannot be used to vary the terms of the final agreement.

Harris argues that an exception applies, citing the proposition that separate deeds or instruments may be construed as one instrument when executed as parts of substantially one transaction. *See Standring v. Mooney*, 14 Wn.2d 220, 227, 127 P.2d 401 (1942). This argument misconstrues *Standring*. The exception clearly applies only to *independent* instruments relating to one transaction, such as the deed, note, and mortgage in the *Standring* case. No Washington case suggests that the exception applies when a subsequent agreement (i.e., a deed) *supersedes* a prior agreement (i.e., a purchase and sale agreement). Unless the law barred the use of superseded agreements to vary the terms of subsequent agreements, the merger doctrine would be meaningless.

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clearly understood the court to be reforming the deed. Harris' counsel even inserted reformation language in preparing the findings of fact and conclusions of law. The trial court substantially modified the findings and conclusions to indicate that he was "resolving an ambiguity" rather than reforming the deed, but his actions speak louder than his words.

Even if the merger doctrine is inapplicable in this case, Harris' reliance on the earnest money agreement is curious. While the earnest money agreement referred to a "right of way easement", the deed specifically *omitted* the easement language. This clearly implies that the parties intended to except the right of way property itself, and not simply an easement in that property.

III. CONCLUSION

Ski Park's prior brief established that the Winkelman deed unambiguously reserved the fee interest in the right of way property. Because Winkelman owned the right of way property in fee at the time of the conveyance, any other interpretation would render the deed exception meaningless and nonsensical. (Appellant's Brief at 17-22).

The discussion above demonstrates that Harris' two-pronged attack on Ski Park's position is ineffective. First, the summary judgment standard of review is applicable on this appeal. Although the trial court entered findings of fact and conclusions of law, these are superfluous in summary judgment proceedings and must be disregarded. Similarly, the parties' alleged stipulation that no genuine issue of fact existed could not alter the standard of review because of the very nature of summary judgment proceedings.

Second, Harris cannot create an ambiguity by the use of "full blown" extrinsic evidence or the earnest money agreement. The deed language becomes unambiguous when interpreted in light of the surrounding circumstances. Therefore, it is improper to consider "stage three" extrinsic evidence such as affidavits to create an

ambiguity. Likewise, the earnest money agreement cannot be considered because it merged into the executed deed.

For the reasons stated in Ski Park's prior brief and in this reply brief, appellant Ski Park Farms respectfully requests that this Court reverse the trial court's summary judgment order and grant judgment in favor of Ski Park as a matter of law. In the alternative, Ski Park requests that this court remand this case to the trial court for resolution of remaining factual issues at trial.

RESPECTFULLY SUBMITTED this 23 day of June, 1989.

GORDON, THOMAS,
HONEYWELL, MALANCA,
PETERSON & DAHEIM
Attorneys for Appellant

BY: /s/ Bradley A. Maxa
BRADLEY A. MAXA
DONNA R. ROPER
STEPHANIE A. AREND

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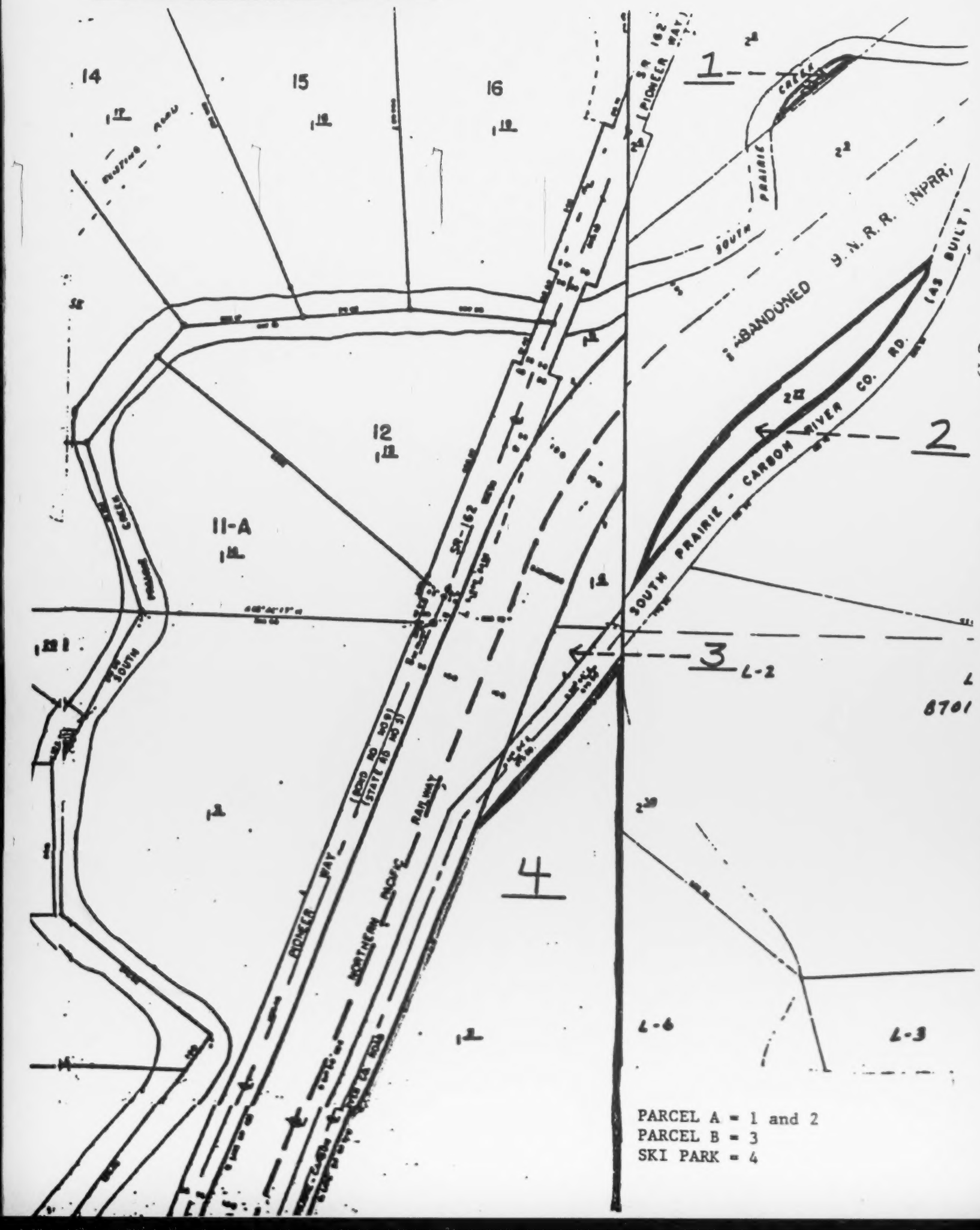


SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

MARY HARRIS, et al., Plaintiffs, vs. SKI PARK FARMS, INC., Defendants.	NO. 87-2-01090-8 JUDGMENT ON MANDATE GRANTING SUMMARY JUDGMENT AND QUIETING TITLE IN SKI PARK FARMS, INC.

This matter coming on regularly for hearing before the Court this day, Ski Park Farms, Inc., defendants, appearing by and through their attorneys, Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, and plaintiff, Mary E. Harris, appearing by and through her attorney, Susan R. Sampson, of Sampson, Wilson, Inc., P.S., and the Court, having reviewed the Mandate of the Supreme Court of the State of Washington, Case No. 58600-4, which affirmed the decision of the Court of Appeals Division II, Case No. 12321-5-II, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

The Court hereby grants summary judgment in favor of the defendants Ski Park Farms, Inc. and quiets title in Ski Park Farms, Inc. to the real property (the "Property") located in Pierce County, Washington, which Property is legally described on Exhibit "A" and illustrated on Exhibit "B" to this Judgment on Mandate. It is further

ORDERED, ADJUDGED AND DECREED that plaintiff Mary E. Harris, and all persons claiming through the

plaintiff be and are hereby forever barred from having or asserting any right, title, estate, lien, or interest in any portion of the Property and its improvements. It is further

ORDERED, ADJUDGED AND DECREED that no costs or fees be awarded to either plaintiff or defendant.

DONE IN OPEN COURT this ___ day of _____, 1993.

FRED FLEMING
JUDGE

Presented by:

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM

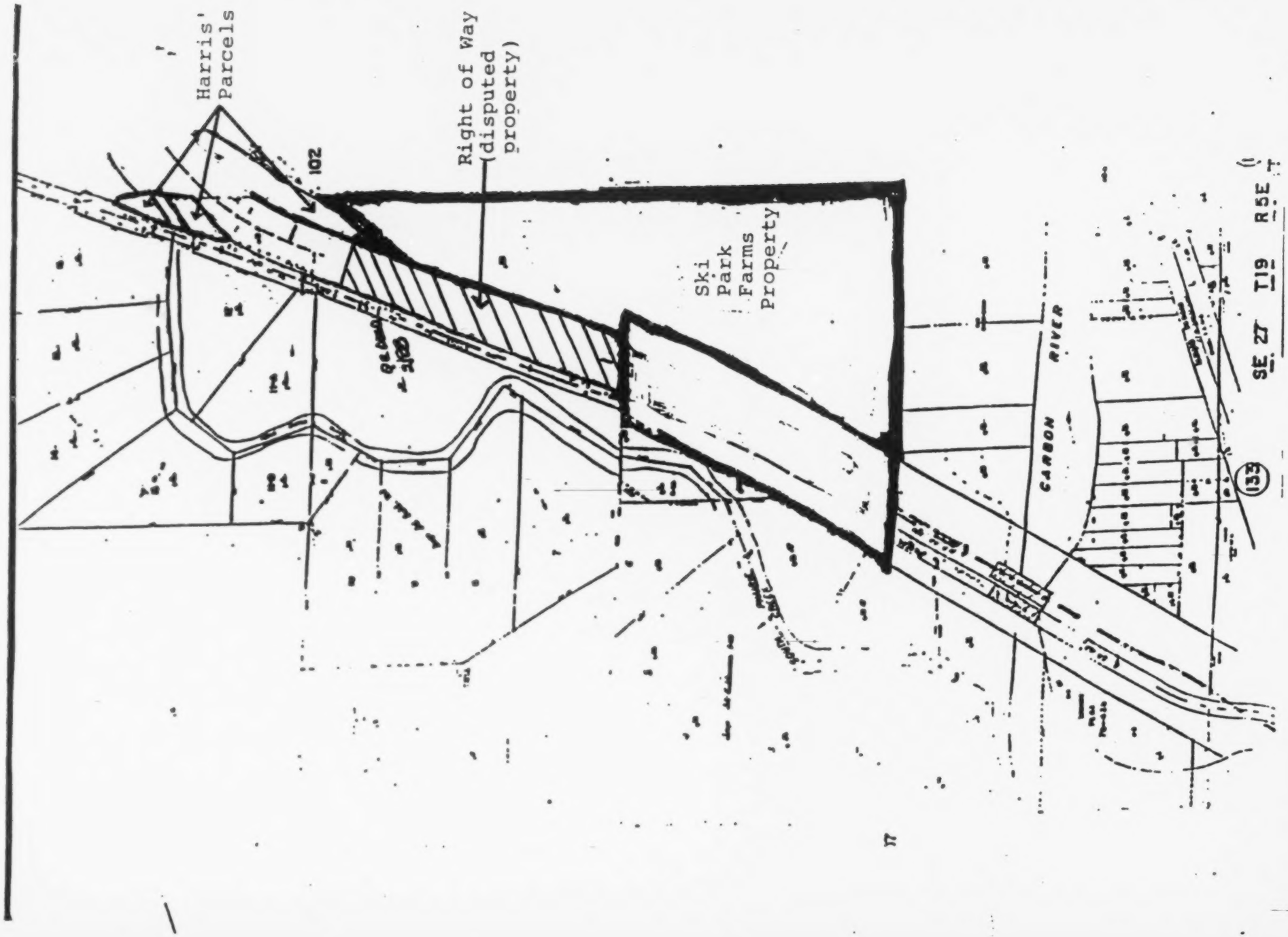
By: Donna R. Tait
Donna R. Tait
WSBA No. 15204
Attorney for Defendant
Ski Park Farms, Inc.

EXHIBIT "A"

Legal Description

All that portion of the Burlington Northern Railroad Company's (formerly Northern Pacific Railway Company) McMillin to Buckley, Washington Branch Line right-of-way, now abandoned, located over, across, and on the 200-foot wide Branch Line right-of-way being 100 feet on each side of said Main Track centerline in the Southeast quarter of the Northeast quarter of said section 27, lying North of the South line of said Southeast quarter to the Northeast quarter of said Section 27, and lying

South of a line drawn at right angles to the East line of said right-of-way at the point of intersection of the said East line and the Northerly line of South Prairie-Carbon River County Road as shown on survey recorded under Pierce County Auditor's Fee No. 8701200255. Subject to the rights of the public to use South Prairie-Carbon River County Road and SR 162, Pioneer Way.


Harris' Parcels
Right of Way (disputed property)
Ski Park Farms Property
102
CARBON RIVER
133
SE 27 T19 R5E